

This electronic thesis or dissertation has been downloaded from the King's Research Portal at <https://kclpure.kcl.ac.uk/portal/>



**Demarcation of the line between lawful and unlawful conduct of warfare
the law of targeting at the International Criminal Tribunal for the Former Yugoslavia**

Adams, Catherine

Awarding institution:
King's College London

The copyright of this thesis rests with the author and no quotation from it or information derived from it may be published without proper acknowledgement.

END USER LICENCE AGREEMENT



Unless another licence is stated on the immediately following page this work is licensed

under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International

licence. <https://creativecommons.org/licenses/by-nc-nd/4.0/>

You are free to copy, distribute and transmit the work

Under the following conditions:

- Attribution: You must attribute the work in the manner specified by the author (but not in any way that suggests that they endorse you or your use of the work).
- Non Commercial: You may not use this work for commercial purposes.
- No Derivative Works - You may not alter, transform, or build upon this work.

Any of these conditions can be waived if you receive permission from the author. Your fair dealings and other rights are in no way affected by the above.

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

Demarcation of the line between lawful and unlawful conduct of warfare:

The law of targeting at the International Criminal Tribunal for the Former Yugoslavia

Catherine Alice Adams

King's College London

Thesis submitted for the degree of Doctor of Philosophy

96238 Words

Abstract

In the cases of *Blaškić*, *Galić* and *Gotovina* the judges of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') substantially developed the law of targeting. They did so in line with the precedence of the principle of humanity and a worldview strongly guided by the International Committee of the Red Cross. In affirming that the provisions of Additional Protocol I relating to targeting can be the basis for a conviction, the judges rendered certain earlier provisions incorporating 'military necessity' (although not the broader principle itself) potentially obsolete in this context.

This application of the principle of humanity was not, however, at the expense of military perspectives. The judges paid considerable attention to the views of those with military experience. They considered their judgments to be supported by a body of military opinion even if, in places, there were military practitioners who disagreed with their judgments.

A large amount of expert and technical evidence was provided to the judges to assist with the evidential determinations required to apply the law of targeting; in relation to establishing who fired artillery and with what intention. The experience and knowledge of military and civilian non-expert witnesses who had physically experienced the effects of the targeting decisions in question also, however, had a significant influence on the judges' findings as to the evidence.

ICTY jurisprudence gave precedence to convictions pursuant to Article 7(1) of the ICTY Statute rather than Article 7(3) superior/command responsibility. An absence of direct evidence of targeting decision making by these commanders meant, alongside evidence of the orders they had issued, the judges considered circumstantial evidence including that of the accused's role in the broader conflict.

Contents	Page No.
Abstract	2
Chapter 1 – Introduction	
The ICTY and the law of targeting	9
Research question	16
Research findings	17
Demarcation of the line: Judging war crimes charges	19
Judicial creativity	24
What factors play a role in judicial creativity?	31
Judicial creativity and the law of targeting	37
Method	39
Research questions	41
A note on language and documents at the ICTY	42
Approach from social science - qualitative content analysis	43
Identification of specific relevant material for analysis	45
Use of NVivo and coding	48
Contribution from Judge Ćinisi	50
Assessing quality of research	51
Summary of research method	52
Outline	53
Chapter 2 – The framework for the demarcation of the law of targeting at the ICTY	
Introduction	55
War crimes jurisdiction of the ICTY: Article 3 of the ICTY Statute	55
The charges brought in the cases	58

Introduction to customary and conventional law relevant to targeting charges	63
Criminal responsibility for breaches of the law	69
Rules of procedure and evidence at the ICTY	72
Conclusion	75
Chapter 3 – Law	
Introduction	77
Distinction	78
Indiscriminate attacks	82
Definitions of Civilian, Civilian Population and Military Objectives	85
Civilian and Civilian Population	86
Military Objective	93
Koševo Hospital	98
Proportionality	100
Shelling of football tournament	104
Martić	107
Conclusion	112
Chapter 4 – Evidence I: The Witnesses	
Introduction	115
The witnesses' evidence at the ICTY	116
Live testimony and use of witness statements	117
Expert witness evidence	120
The witnesses presenting evidence relating to the firing of artillery	122
Role of civilian or military status of the witnesses	124
Description of civilian or military background of witnesses relied on for	131

specific incidents	
The judges and the witnesses	134
Conclusion	137
Chapter 5 – Evidence II: Finding criminal intent	
Introduction	140
The problem of proving intention/effects-based assessments of targeting intentions	142
Approach to targeting evidence	143
Use of experts in relation to targeting matters	154
Zenica	155
Experts and crater analysis of Markale Market shelling: Establishing source of fire	156
Use of experts in Gotovina: The use of a ‘200m rule’ as a presumption of legality	159
Role of military experience	166
Role of civilian evidence	176
The water queue shelling incident	177
Markale Market	178
Comparison of the application of the principle of distinction in charges related to the shelling of Sarajevo and Knin in the context of expert/non expert/technical evidence	184
Conclusion	189
Chapter 6 – Responsibility	
Introduction	192
Criminal intention	195
Criminal Intention for ‘ordering’	199
Orders	204

Interpretation of orders	205
Inference of existence of unlawful orders	212
Evidence of 'agreement' or 'collusion' with the overarching political plan as a factor in a commander's responsibility (individual or command) including participation in a Joint Criminal Enterprise	214
Alignment with broader criminal political 'plan' or 'ambitions'	215
Joint Criminal Enterprise	222
Conclusion	226
Chapter 7 – Conclusion	
Introduction	229
A change of focus: Civilians and the protection of their 'humanity' in the ascendant	231
Key role of the military viewpoint and importance of civilian witnesses with lived experience of the use of artillery	235
The criminal responsibility of military commanders	237
Conclusion	240
Bibliography	242

List of Charts

Chart	Description	Page No.
Bar Chart 1	Background (military or civilian status) of witnesses testifying in relation to targeting matters	126
Bar Chart 2	Background (military or civilian status) of witnesses testifying in relation to targeting matters divided by case	127
Bar Chart 3	Evidence provided by witnesses as to civilian status of victims	128
Bar Chart 4	Evidence provided by witnesses as to political role of accused	129
Bar Chart 5	Evidence provided by witnesses as to targeting of civilians	130
Pie Chart 1	Percentage of each type of witness for <i>Galić</i> First Scheduled Shelling Incident	132
Pie Chart 2	Percentage of each type of witness for <i>Galić</i> Second Scheduled Shelling Incident	132
Pie Chart 3	Percentage of each type of witness for <i>Galić</i> Fifth Scheduled Shelling Incident	133
Pie Chart 4	Percentage of each type of witness for factual and legal findings in relation to Knin	133

Table of Commonly Used Abbreviations

ABiH	Armed Forces of the Republic of Bosnia and Herzegovina
API	1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts
HV	Armed Forces of Croatia
HVO	Croat Council of Defence
ICRC	International Committee of the Red Cross
ICRC Commentary	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz, Christophe Swinarski, Bruno Zimmerman (eds.), <i>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</i> (Geneva: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987)
OTP	Office of the Prosecutor of the ICTY
RPE	ICTY Rules of Procedure and Evidence
SFRY	Socialist Federative Republic of Yugoslavia
SRK	Sarajevo Romanija Corps
SVK	The Serbian Army of Krajina
UNPROFOR	United Nations Protection Force

This study is about the demarcation of the line between lawful and unlawful conduct of warfare carried out by the International Criminal Tribunal for the Former Yugoslavia ('ICTY'). By 'demarcation' it is meant something akin to demarcation following the delimitation of boundaries; we may, technically speaking, know the agreed line of a boundary but until it is physically marked there is room for uncertainty as to where it actually falls on the ground.¹ In the context of this project the study of *demarcation* translates to an investigation into the judicial *findings* as to individual criminal accountability for the commission of certain war crimes. These war crimes are of a nature that go to the very heart of what soldiers do in war: targeting.

The ICTY and the law of targeting

The Yugoslav war of the 1990s was one in which civilians were attacked directly and specifically as such through campaigns of ethnic cleansing.² The Yugoslav war was also one in which recognisable military operations between armed forces did occur. The Office of the Prosecutor ('OTP') at the ICTY made the decision to address the conduct of these military operations where they believed that criminal breaches of the international laws governing the conduct of warfare had taken place, indicting soldiers for 'ostensibly doing the things they are supposed to do'.³

This was a significant decision made by the OTP which led to judicial consideration of matters that are usually left firmly in military hands. The judges of the ICTY were in these circumstances given the role of deciding where the line between lawful and unlawful conduct in war falls.

¹ For an explanation of the development of the definition and use of these terms see Dennis Rushworth, 'Mapping in Support of Frontier Arbitration: Delimitation and Demarcation', *IBRU Boundary & Security Bulletin* 5, no. 1 (1997): 61-64.

² James Gow, *The Serbian Project and its Adversaries: A Strategy of War Crimes* (London: Hurst & Company, 2003), 3-4 and Chapter 5.

³ Gow, *The Serbian Project and its Adversaries: A Strategy of War Crimes*, 304.

This study focused on the treatment of the law governing the conduct of hostilities relating to 'targeting' decision making of armed forces by the judges of the ICTY. Michael Schmitt states that

Targeting is the *sine qua non* of warfare. Reduced to its essence, war is about attacking the enemy. The law of targeting consequently lies at the very heart of the law of war.⁴

Establishing the precise contents of the international legal rules to be complied with in order for the conduct of warfare to be lawful requires a study of treaty and customary law that may not always give a straightforward answer. Applying these rules in certain real-life scenarios is likely to be even more difficult. The question of what can and cannot, should or should not be targeted in an attack can have a humanitarian, legal, political or practical answer, among others. Even though they may provide a framework within which decisions should be made, however, the legal rules 'rarely provide the actual answers'.⁵ The law in this area is not always able to specify exactly as to where the line is crossed into illegality in targeting matters.

In certain cases before the ICTY, the judges were asked to decide what constituted a legitimate target and the limits on how it may be attacked. The law governing these questions of the legality of attacking/targeting a particular object or location in a particular manner is what I mean by 'the law of targeting'. That is, the law of targeting is defined here as the law governing what can and cannot be lawfully attacked; and if it can be attacked under what circumstances and conditions this may take place.

The question this study set out to answer was how had the judges in certain cases at the ICTY implemented the law of targeting and, given this, could any factor(s) be identified as having influenced the many decisions on law, evidence and responsibility they had made in reaching their judgments? In particular, did the principle of humanity, identified in the literature as a motivating feature of the ICTY judges' work in other areas have a role in this demarcation of the law of targeting?

In relation to the law that the ICTY was to apply, David Scheffer wrote that:

⁴ Michael N. Schmitt in his Foreword to William H. Boothby, *The Law of Targeting* (Oxford: Oxford University Press, 2012), vii. See also Michael N. Schmitt, 'Fault Lines in the Law of Attack', in *Testing the Boundaries of International Humanitarian Law*, eds. Susan Breau and Agnieszka Jachec-Neale (London: British Institute of International and Comparative Law, 2006), 277-307.

⁵ Th A. van Baarda, 'Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics', *Yearbook of International Humanitarian Law* 11 (2008): 5.

The legacy of Nuremberg and its focus on individual criminal responsibility reasserted itself as we labored to build a new tribunal. There was little difficulty in determining what constitutes an atrocity crime ripe for prosecution by the tribunal, for by 1993 the general framework of such crimes—genocide, crimes against humanity, and war crimes—was embedded in international law to a degree that welcomed a new age of criminal prosecution. *The inevitable nuances would have to be sorted out by the judges in their reasoned judgments.* [Emphasis Added]⁶

The opportunity for the ICTY judges to pronounce on matters of the legality of military attacks was, in fact, unprecedented. In 2000, William Fenrick stated ‘there are no usable precedents for judicial determination of the lawfulness of particular attacks’.⁷ As will be described later in this and the next two chapters, the establishment of the ‘nuances’ of the law in reality meant the significant development of the law of targeting by the judges. The law as drafted in the treaties was not written as a criminal code. The judges had to establish the precise contents of the relevant rules where there were significant uncertainties, room for interpretation or ‘gaps’ in the law and precedent available to them. In these spaces it is apparent that the judges had to exercise ‘judicial creativity’ to come to a decision.

It is here, in this significant work in defining and applying the law of targeting that the judges of the ICTY carried out, that this research is based. It looks to what the judges did to apply the law in the absence of clear precedent as regards the law, handling of evidence and rules of individual responsibility. There was room for extra-legal considerations and the interplay of humanitarian and moral impulses with the legal work before them and political situation around them. There was also, however, in the context of criminal proceedings, a need to respect the principle of *nullum crimen sine lege* (the prohibition of retroactive effect of law) and ensure that the accused were given fair trials.

It is not the question of which law applies which is key to this study (although this in itself can be more complicated than first appears given the legal situation in the break-up of the Former Yugoslavia).⁸ The key is instead what the applicable law means for those seeking to apply it.

⁶ David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2011), 21.

⁷ W. J. Fenrick, ‘Commentary: A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the *Prosecutor V. Tihomir Blaškić*’, *Leiden Journal of International Law* 13, no. 04 (2000): 931.

⁸ This includes questions as to when various parts of the SFRY became independent states, succession to the SFRY’s international treaty obligations and whether and at what times the conflict or parts of it were international in nature. See, for example, the decisions in the case of *Prosecutor v. Pavle Strugar* which

This study is interested in how judges use the black letter or textbook rules on the laws of the law of war to come to findings of individual criminal responsibility or innocence. It is therefore a question of interpretation and application. Most law is applied without having to question what exactly it means. In unclear cases, however, it is usually a court (or other authority given a quasi-judicial power to so decide) who ultimately decides what the law means in a particular situation. What was particularly striking about the establishment of the ICTY was that it was established to apply international criminal law, therefore providing a rare forum for matters of international criminal law to be decided upon by international judges.

Despite some arguments to the contrary, recourse to war and what is permitted within it has been subject to regulation, from varying sources and to varying degrees, for thousands of years.⁹ Arguments as to the consequences of these breaches are equally ancient. The approach to war in international law that dominated the twentieth century and now the twenty first is, given that war is something that remains inevitable, how should it be regulated so that it causes the least possible harm to those who should not be harmed.¹⁰ This is not the only potential option, but it is widely supported.¹¹

The regulation of war had traditionally been broken down into two broad fields; the Hague field of law derived from various Hague Conventions focussed on the conduct of hostilities,¹² and the Geneva field based on the 1949 Geneva Conventions which brought in more protections for those not actively involved in the conflict, including civilians.¹³ The Additional

related to the shelling of Dubrovnik in Croatia early in the conflict (Case No. IT-01-42, Trial Chamber Judgement of 31 January 2005 and Appeals Chamber Judgement of 17 July 2008).

⁹ See, for example, Gregory P. Noone, 'History and Evolution of the Law of War Prior to World War II', *Naval Law Review* 47 (2000), 176-207 and Karima Bennoune, 'As-Salamu Alaykum: Humanitarian Law in Islamic Jurisprudence', *Michigan Journal of International Law* 15 (1993-1994), 605-643.

¹⁰ This is the approach of the International Committee of the Red Cross ('ICRC'). See their summary of their Mandate and Mission available at <http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm> (last accessed 28.09.2019).

¹¹ Theodor Meron, 'The Humanization of Humanitarian Law', *The American Journal of International Law* 94, no. 2 (2000): 241.

¹² Including the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its annex.

¹³ In particular in Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949. See Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2000) for descriptions and contents of the full range of Hague and Geneva Conventions. See Robert Kolb, 'The Main Epochs of Modern International Humanitarian Law since 1864 and their Related Dominant Legal Constructions', in *Searching for a 'Principle of Humanity' in International Humanitarian Law*, eds. Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (Cambridge: Cambridge University Press, 2012), 45-52 for a description of the important humanitarian breakthrough that the Geneva Conventions represented compared to the 'military law' of the Hague.

Protocols to the Geneva Conventions have rendered the Hague/Geneva distinction somewhat irrelevant as they encompass elements of both.¹⁴ This initial division, however, explains the development of the use of the two main terms used to describe the laws governing war; the law of armed conflict ('LOAC') and international humanitarian law ('IHL'). There remains debate as to whether these now refer to identical concepts although the terms are used interchangeably in this study.¹⁵

This legal approach of restricting the permitted means and methods of armed force is frequently described as constituting a compromise between military necessity and humanitarian requirements.¹⁶ The relative position of the compromise between the two considerations may vary between provisions, but it runs throughout the law governing armed conflict.¹⁷

Mirroring the balance between humanity and military considerations in the law, the academic and broader debate in this area tends to divide broadly into military and civilian viewpoints. Although it is obvious that military personnel are not inhuman and civilians are capable of appreciating military concerns, there is a perception that the answers as to the demarcation of the line between lawful and unlawful conduct of hostilities would be different from each side. Two different interpretive communities have been described, who have, on the whole, adopted an adversarial position to each other: those in the military who start from the viewpoint of military necessity (LOAC version) and those humanitarian lawyers who start from the viewpoint of the principle of humanity (IHL version).¹⁸

One factor which sets the modern law of armed conflict apart from most other areas of international law is that individuals as well as states may be found in breach of the rules, and, for some actions, incur criminal liability for this breach. There are many different acts which

¹⁴ 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts ('API') and 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts. For an introduction to API see Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2000), 420-422.

¹⁵ Page Wilson, 'The myth of international humanitarian law', *International Affairs* 93, no. 3, (May 2017): 563-579.

¹⁶ See, for example, Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (The Hague: Hague Academy of International Law, 2011), 68-70.

¹⁷ van Baarda, 'Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics', 25.

¹⁸ David Luban, 'Military Necessity and the Cultures of Military Law', *Leiden Journal of International Law* 26, no. 2 (2013): 315-349.

are prohibited by the laws of war and some of these are also classed as criminal acts which should be prosecuted as such.¹⁹ To the extent the laws of war are concerned with criminal conduct, it forms part of international criminal law ('ICL').

International courts or tribunals have been established for the purpose of prosecuting war criminals, most famously including the International Military Tribunal at Nuremberg for the Trial of the Major War Criminals ('Nuremberg IMT'), but this was, until relatively recently, an unusual occurrence. The international political situation around the Yugoslav war of the 1990s, however, gave rise to the International Criminal Tribunal for the former Yugoslavia ('ICTY') and from this, a rare opportunity for international judicial consideration of the line between lawful and unlawful conduct of hostilities.

The law of armed conflict had historically rarely been considered from a jurisprudential perspective, possibly arising in part from the, now old fashioned, ambiguous status given to international law by legal philosophers.²⁰ It was also because of the lack of actual cases of international courts applying IHL and/or ICL after the Nuremberg and Tokyo International Military Tribunals. What has, however, been noticeable in the past decade or so is the increase in consideration of the theory of ICL and IHL. This has clearly been driven by the creation of the various international criminal tribunals and the International Criminal Court which have been considering and applying this law in practice.²¹

The main body of literature regarding IHL and ICL as it specifically relates to targeting and command responsibility is written from a practitioner viewpoint as to the current contents of the law²² or from the perspective of its historical development. There is very little broader theoretical or critical writing here. The strong practise/theory divide, with emphasis on the former, is typical of legal literature and makes sense given the practitioner driven development of this field.

¹⁹ See, for example, Terry Gill and Dieter Fleck, eds., *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2011), Chapters 24, 29, 30.

²⁰ Typified by the approach in Chapter X of H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon, 1994). See Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart', *European Journal of International Law* 21, no. 4 (2010): 967-995.

²¹ For other factors, see Tom Ginsburg and Gregory Shaffer, 'How does International Law Work?' in *The Oxford Handbook of Empirical Legal Research*, eds. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2010), 754-755.

²² For example, William H. Boothby, *The Law of Targeting* (Oxford: Oxford University Press, 2012) and Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 3rd ed. (Cambridge: Cambridge University Press, 2016).

Where there has been some significant analysis of the development of the law is that considering the ‘judicial creativity’ of the ICTY.²³ This study fits within this field of analysis and seeks to take the findings of judicial creativity in this literature and attempt to demonstrate some of the influences that were at work in relation to the law of targeting. Although it is ‘critical’ of the work of the tribunal, as in it considers and assesses the work of the judges, the appraisal of judicial creativity here is not a critical approach in the sense used by critical legal scholars. It is, in fact, one of the most ‘internal’ forms of criticism, not questioning the broader or underlying presumptions and power structures of the tribunal and its work.²⁴

The judges of the ICTY were not permitted to ‘make’ the law. This is an application of the fundamental legal principle that someone cannot be convicted of or punished for a crime that did not exist at the time of their actions that are under scrutiny.²⁵ At the ICTY, however, the judges had to fulfil their function of applying the existing law even in cases where it was not clear what the law was or what it required. This opens up questions of legal philosophy, discussed later in this chapter, as to what, exactly, the role of the judge is and how far their ‘interpretation’ of the law or their ‘judicial creativity’ can and should go. This in turn leads into consideration of a theme of the influences, including that of the idea of ‘humanity’, on the judges in the judgments of the ICTY relating to the law of targeting.

This study looked in some detail at the facts as presented to the judges at the ICTY in the three cases under consideration. It is clear that it is not only the law that is interpreted by the judges in the process of producing a judgement, but also the evidence before them. Gerry Simpson, in introducing the book *Hidden Histories of War Crimes Trials*, describes law as a ‘producer of truth’ and ‘memory’ but notes an unease of the relevant authors in this book towards ‘the idea

²³ For example, Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011).

²⁴ See Chapter 1 in Christine Schwöbel, ed., *Critical Approaches to International Criminal Law: An Introduction* (Abingdon: Routledge, 2014).

²⁵ This was highlighted in the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993 (‘Report of the Secretary General’) which recommended the terms on which the ICTY be established. Certain elements of the description of and comments on the Report of the Secretary-General and the law and cases under investigation included in this thesis have been published in Catherine Adams, ‘Chapter 4: International Law and Institutional Legacy’ in *Prosecuting war crimes: lessons and legacies of the International Criminal Tribunal for the former Yugoslavia*, eds. James Gow, Rachel Kerr, and Zoran Pajić (Abingdon, Oxon; New York: Routledge, 2014).

that law could provide a definitive accounting or any sort of stable representation of atrocity or trauma'.²⁶

Geoffrey Nice states in his summary for a chapter interestingly entitled 'Legal Process as a Tool to Rewrite History' that the ICTY trials did not set out to 'write history', pointing out that 'every trial record produces at least two competing narratives... none of which may be accurate'.²⁷ The judges at the ICTY had to consider a massive amount of this conflicting evidence and put together in a judgment a convincing appraisal of the meaning of what they had seen and heard as it specifically related to the accused and the applicable law.

The novel nature of the situation at the ICTY in what the judges were being asked to judge upon in relation to targeting matters is one reason for the focus of this study. The other is that there was an absence of an examination beyond the usual case report approach of what was involved in the judicial work of demarcation of this boundary between lawful and unlawful conduct as it related to questions of targeting (in part linked to the uniqueness of the relevant cases at the ICTY). There seemed to be room to add something to the academic understanding of what the judges were doing through a study using a qualitative social scientific approach to examine the factors underlying some of the legal outcomes produced by the ICTY.

Research question

The question at the core of this research is, in the demarcation of the line between lawful and unlawful conduct of targeting in warfare, in an arena apparently pulled between the dictates of humanity and military necessity, how did the judges implement the law of targeting and, given this, could any factor(s) be identified as having influenced the many decisions on law, evidence and responsibility they had to make in reaching their judgments?

It is clear from the academic consideration of other aspects of the ICTY judges' work that concepts such as humanity and morality potentially played a role. The literature points out that where they were given room to enhance the protections afforded to those caught up in

²⁶ Gerry Simpson, 'History of Histories', in *Hidden Histories of War Crimes Trials*, eds. Kevin Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 43.

²⁷ Geoffrey Nice, *Justice for all and how to Achieve It* (London: Scala Arts & Heritage Publishers Ltd, 2017), 51.

rather than fighting the war, they tended to do so. This research set out to ask whether it was the idea of humanity, broadly defined as a regard for the need to protect the innocent from the effects of war, that most influenced the judges in their demarcation of the law of targeting. Was 'humanity' a clear overriding influence in the case of the application of the law of targeting or could other factors be identified as equally or more important to the judges?

The first element of the research question was, therefore, how had the judges approached the legal questions arising from the application of the law of targeting and to what extent did humanity, or any other concept or factors, influence the findings of the judges in this regard? That is, where they were required to define the law and make legal findings as regards targeting were there any identifiable influences on the work of the judges? The findings in relation to this question are presented in Chapter 3 (Law).

It is not just on the content of the law that the judges had to make decisions. They had to assess the evidence before them and establish what they found to be sufficient to rely on to make a finding of what had in fact happened in the scenario before them. Where would the idea of humanity fit, if at all, in such considerations? The second element of the research question therefore asks how the judges approached and decided on questions of evidence in relation to the law of targeting and what influences were apparent on this. The findings in relation to this question are presented in Chapters 4 and 5 (Evidence I and II).

The third element of the research question asks what findings the judges made in relation to individual criminal liability for acts breaching the law of targeting and whether any influences can be identified regarding these findings as to criminal responsibility, that is, as to the guilt or innocence of the accused before them. The findings in relation to this question are presented in Chapter 6 (Responsibility).

Research findings

To answer how the judges had implemented the law of targeting and to identify any factors that had influenced their findings required a consideration of the framework within which the judges were working; this was set within the war crimes jurisdiction of the ICTY and was constructed from the relevant charges brought against the accused, substantive law (including

that of criminal responsibility) and the rules of procedure and evidence. It also required that the different aspects of the decisions reached by the judges were broken down: that is, the findings as regards legal definitions, evidence and individual responsibility all required judicial determination and were relevant to answering the research question.

There are four key findings of this study which arise across four substantive chapters (Law, Evidence I: The witnesses, Evidence II: Finding criminal intent and Responsibility) which cover the elements that must be considered by the judges to come to a finding of guilt or innocence, to place the line on the ground between lawful and unlawful conduct: the law, the evidence and individual responsibility. Some of the findings are specific to one of these elements, others cross the whole thesis.

The first key finding of this study is that the ICTY developed the law of targeting in line with the precedence of the principle of humanity and a worldview strongly guided by the International Committee of the Red Cross ('ICRC'). In affirming that the provisions of Additional Protocol I relating to targeting can be the basis for a conviction, the judges rendered certain earlier provisions incorporating 'military necessity' (although not the broader principle itself) potentially obsolete in this context.

The second key finding is that the ICTY judges did not lose sight of the military viewpoint and they considered that their judgments were always supported by a body of military opinion – even if in places there were strongly opposing views. This is important as it shows the judges were not interested in making findings that were incomprehensible or unworkable to those in fact having to make the targeting decisions.

The third key finding was the importance of the evidence provided by civilian witnesses with lived experience of the effects of artillery. This was even the case where there was also a large amount of technical or expert evidence available.

The fourth key finding is that ICTY jurisprudence gave precedence to convictions pursuant to Article 7(1) of the ICTY Statute rather than Article 7(3) superior/command responsibility. An absence of direct evidence of targeting decision making by these commanders meant, alongside evidence of the orders they had issued, the judges considered circumstantial evidence including that of the accused's role in the broader conflict.

The concept of humanity was clearly a strong factor in the judges' approach. There was, in addition, however, an important role for the military viewpoint that proved particularly powerful in the case of the application of the law of targeting. This military viewpoint was not, however, lacking in any apparent humanity.

The next section will consider in some more detail the concepts of judicial creativity and humanity which form the basis of the framework of this thesis. This chapter will then go on to describe the method adopted in this study before giving a summary of this dissertation as a whole.

Demarcation of the line: Judging war crimes charges

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 was established by the United Nations Security Council on 25 May 1993.²⁸ The resolution creating this tribunal was one of a series of Security Council resolutions adopted in response to the ongoing conflict in what had been the Socialist Federative Republic of Yugoslavia ('SFRY').

In Security Council Resolution 780 (1992) a Commission of Experts was established to 'examine and analyse' information already submitted to the Security Council as well as that it was to 'obtain through its own investigations'. This was to be done 'with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia'.²⁹ In Security Council Resolution 808 (1993), the Security Council stated that 'having considered' the interim report of the Commission of Experts in which the experts 'observed that a decision to establish an ad hoc international tribunal in relation to events in the territory of the former Yugoslavia would be consistent with the direction of its work', it had decided to establish an international tribunal 'for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'. In the same resolution it requested that the Secretary General of the United Nations report back on 'all aspects of this matter, including specific

²⁸ Security Council Resolution 827 (1993) of 25 May 1993.

²⁹ Security Council Resolution 780 (1992) of 6 October 1992.

proposals and where appropriate options for the effective and expeditious implementation of this decision.³⁰

Security Council Resolution 827 (1993) approved the resulting 'Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808' ('Report of the Secretary General')³¹ and adopted the suggested statute for an international tribunal annexed to that report (the 'ICTY Statute').³² The ICTY Statute set out the basic structure of the tribunal comprised of the Chambers (judges), Prosecutor and Registry. The judges were to be divided into trial chambers and an appeals chamber to hear cases and their appeals, with their first role being 'as a whole' to draft and adopt rules of procedure and evidence to govern the 'pre-trial phase of the proceedings, the conduct of trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters'.³³ The Office of the Prosecutor ('OTP') was to investigate cases, prepare indictments and prosecute the accused.³⁴ It was not, however, by any means certain at this point that a fully functioning tribunal could or would be brought into existence and it took some years of uncertainty, and the dedication of its supporters, before it could be recognised as such.³⁵

The initial name of the tribunal did not include the word 'criminal' but it is clear that this tribunal was intended to be a criminal court, in the words of Resolution 827, to 'bring to justice' those who were responsible for the 'widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia'. The tribunal's more enduring title, the 'International Criminal Tribunal for the Former Yugoslavia' or 'ICTY' reflects this.

³⁰ Security Council Resolution 808 (1993) of 22 February 1993.

³¹ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993.

³² David Scheffer, former US Ambassador-at-large for War Crimes, provides an insider background to the machinations of the members of the Security Council at this time, the controversial use of power under which the Security Council was able to establish a tribunal using their powers under Chapter VII of the UN Charter and the significant role of the United States permanent representative to the United Nations at the time, Madeleine Albright. See in particular Chapter 1 of David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2011).

³³ Paragraph 83, Report of the Secretary General.

³⁴ Paragraphs 85, 93-97, Report of the Secretary General.

³⁵ See, for example, Antonio Cassese's description of his experience in Guido Acquaviva, 'A Conversation with Antonio Cassese', *Leiden Journal of International Law* 25, no. 3 (2012): 824 and Chapter 1 of Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*.

The law set out in the Geneva Conventions and their Protocols forms the basis of but also must be distinguished from the criminal law that the ICTY was established to apply.³⁶ International criminal law ('ICL') is a much broader field than that of criminal breaches of IHL/LOAC but the work of the ICTY brought this aspect of it into the spotlight. In his report, the Secretary General set out the relevant crimes he considered to be firmly established in international law. These were translated into the ICTY Statute which set out the crimes over which the ICTY was to have jurisdiction, namely the crimes of Grave Breaches of the Geneva Conventions of 1949, Violations of the Laws or Customs of War, Genocide and Crimes Against Humanity.

The ICTY was widely seen as picking up the baton of the Trial of the Major War Criminals at the International Military Tribunal at Nuremberg ('Nuremberg IMT') and, although mentioned less often, the International Military Tribunal for the Far East ('Tokyo IMT'). Even though the Nuremberg IMT was established by treaty, the London Agreement of 8 August 1945,³⁷ and the Tokyo IMT was established by Special Proclamation of General Douglas MacArthur, the Supreme Commander Allied Powers, on 19 January 1946,³⁸ the ICTY, established by the Security Council, in very different circumstances, was seen by those establishing it as their direct descendant.³⁹

Reading even the first few pages of *Reaching Judgment at Nuremberg* will probably give any student of the proceedings at the ICTY a sense of *déjà vu*.⁴⁰ It is taken for granted that the Nuremberg IMT is the main precedent for the establishment and legal jurisprudence of the ICTY, insofar as the ICTY is an international tribunal, applying international law to crimes committed during war. What is sometimes lost is how familiar the questions that arose in relation to judging the defendants before the ICTY would be to those members of the Nuremberg IMT judging the major war criminals. A description of both institutions, particularly in the early years of the ICTY, could equally include judges from differing legal backgrounds and jurisdictions judging on ill-defined crimes and means of responsibility within a novel and

³⁶ See, for example, Darryl Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law* 21, no. 4 (2008): 925-963.

³⁷ Made between the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (Set out in Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946 (the 'Blue Series'), Volume 1, pp.8-9)

³⁸ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal - A Reappraisal* (Oxford: Oxford University Press, 2008), 25.

³⁹ See Chapter 1 of Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*.

⁴⁰ Bradley F. Smith, *Reaching Judgment at Nuremberg* (London: Andre Deutsch, 1977).

sparsely demarcated procedural and evidential framework. It could also include that both sets of judges were particularly interested in the live testimony of victim witnesses. Taking the comparison further, at both institutions prosecutorial forces sought to stretch the application of the law and defence counsel were overwhelmed by mountains of documentary evidence and at times failed to effectively challenge the prosecution and misunderstood or aggravated the judges.

Bradley Smith starts *Reaching Judgment at Nuremberg* with the statement ‘To assess the judgment in a trial, we must first know who is doing the judging, who is being judged, and what are the charges and the system of law in use.’⁴¹ What is worth highlighting and that may seem unusual in this quote from Smith is the equal importance placed on those ‘doing the judging’ with those being judged. This is because we usually presume that it does not or should not matter who is doing the judging – if they have become a judge they will be applying the law with reference only to the law and evidence. As Schmitt points out, technically it is only states who have the power to create and alter the international law of armed conflict.⁴² Smith has, however, highlighted a fundamental matter of legal philosophy – that is, what role do and should judges have in legal decision making where the law and evidence do not present a clear answer. This was important at the Nuremberg IMT and was important at the ICTY. The legacy of judicial institutions depend to a large extent on the perceived legitimacy of their findings. If the judges are seen to be making up the law to suit their own, or others’ agendas, the legitimacy of and what power a judicial decision could have will fall away.⁴³

The Nuremberg IMT’s members had differing views on how they should make important legal decisions in areas where there was no clear law. One of the Soviet judges held the view in relation to the questions surrounding the charges of planning an aggressive war that ‘the judges were there to innovate, and they should frankly admit that they were establishing a new basis in international law’.⁴⁴ The ‘Western’ judges saw this as ‘far too daring and potentially dangerous’ and brought the discussion back within ‘customary legal discourse’.⁴⁵

⁴¹ Smith, *Reaching Judgment at Nuremberg*, 3.

⁴² Michael N. Schmitt in his Foreword to William H. Boothby, *The Law of Targeting* (Oxford: Oxford University Press, 2012), vii.

⁴³ See, for example, Ruth Mackenzie and Philippe Sands, ‘International Courts and Tribunals and the Independence of the International Judge’, *Harvard International Law Journal* 44, no. 1 (Winter 2003): 271-286.

⁴⁴ Smith, *Reaching Judgment at Nuremberg*, 127.

⁴⁵ Smith, *Reaching Judgment at Nuremberg*, 127.

The use of customary law was one of the key features of the judgments of the ICTY, and will be discussed in detail below.

This idea that the judges of the Nuremberg IMT were ‘innovating’ in some of their decisions remained unspoken in public, however, looking at the state of the law before and after the judgement of the Nuremberg IMT it is clear that in large areas that was ultimately what they were doing. This is particularly evident in the Nuremberg IMT’s acceptance that individuals could be responsible for breaches of international law, described by one author as ‘a necessary and desirable quantum leap’ in the law.⁴⁶ It would be hard not to make a comparison to the work of the ICTY judges here.

Applying the law can be a purely mechanical application of a rule and in the vast majority of cases this is what happens. In some cases, however, a scenario of rules and facts arise that do not allow for a straightforward application of the text or which permit more than one possible interpretation of the applicable law. The ICTY Statute and Rules of Procedure and Evidence were both silent on the question of legal interpretation. This means that the judges were left to their own approaches in exactly how they established the contents of the applicable law and applied this to the evidence when the circumstances required some interpretation on their part.

The ICTY Statute and Rules of Procedure and Evidence also contained no rules as to the relevant sources of law that could be used by the judges in reaching their decisions, in contrast, for example, to the list provided in Article 38 of the Statute of the International Court of Justice (‘ICJ’). The Secretary General intended that customary international law would be applied, however, what actually constitutes customary international law in many cases is not at all self-evident. The judges had to adopt their own approaches to establishing the existence or otherwise of customary law as well as the place of treaty law and rules of national jurisdictions.

⁴⁶ Christian Tomuschat, ‘The Legacy of Nuremberg’, *Journal of International Criminal Justice* 4, no. 4 (September 2006): 840.

The judges have resorted to the identification of general principles of law and the other sources of law identified in Article 38 of the Statute of the ICJ.⁴⁷ They have also used the interpretational rules set out in the Vienna Convention on the Law of Treaties, even though the ICTY is not a treaty based institution.⁴⁸ These approaches have not necessarily been considered a negative development, however, it has led to a discussion of the existence of judge ‘created’ rather than ‘found’ law at the ICTY.⁴⁹

One particular term that has been used to describe what it is in fact that the judges ‘did’ at the ICTY in defining and applying the law in cases where the law was not readily apparent is that they exercised ‘judicial creativity’. The remainder of this section will be used to discuss this concept and what it means in relation to the law of targeting.

Judicial creativity

The judges of the ICTY have not said that they were being ‘creative’ in carrying out their mandate at the ICTY. They would say that they were applying the law. This disagreement reflects the traditional legal debate between ‘positivism’ and alternative interpretations of what it is that judges do (or should do) when faced with a lack of law to apply or no clear answer.

The following sections aim to establish what is meant by ‘judicial creativity’, how its exercise arises and the factors that were particularly relevant to decisions made on targeting law (including the influence of the principle of humanity).

Judicial creativity and positivism

Legal positivism is the approach that most lawyers take to the law without even thinking about it. It is expressed in the fact that they look to statutes, codes, treaties and case law to find the

⁴⁷ Joseph Powderly, ‘Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?’, in *Judicial Creativity at the International Criminal Tribunals*, eds. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2010), 13.

⁴⁸ Powderly, ‘Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?’, 14-23.

⁴⁹ As in, for example, the various contributions to Shane Darcy and Joseph Powderly, eds., *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010).

answer of what the law is in any particular situation. Positivism looks to the systems of law themselves to know what rules are legally binding and separates itself from questions of morality (unlike theories of natural law). Where no straightforward answer can be found, those applying the law have to look to 'rules of recognition', rules of the system itself, to assess whether otherwise non legal norms can be used to reach an answer.⁵⁰

Joseph Powderly, one of the editors of the book 'Judicial Creativity at the International Criminal Tribunals', is of the view that the ICTY 'was certainly not the best venue for the expression of a heartfelt belief in the fundamental applicability of legal positivism'.⁵¹ In Powderly's view, in carrying out their role to apply international criminal law 'in the absence of the right to expressly 'make' substantive law – there was only one acceptable or appropriate means available to the bench, namely the interpretation of the applicable law'.⁵² Interpretation in this sense, however, led to room for judicial creativity at the ICTY.

Positivism, however, appears to be a broad school. Isabel Feichtner describes 'critical positivism' as 'what appears to be Cassese's favoured method for realist utopian scholarship' and 'a method that probably constitutes the predominant method of normative international law scholarship in Europe today'.⁵³ She places it in the middle between natural law and policy oriented approaches on one side and doctrinal constructivism on the other. This is because it has a relatively strong emphasis on existing international law and finding guiding values from within the international legal order but it also utilises teleological interpretation and non-legal considerations (including political ones) in the interpretation and construction of the law.⁵⁴

Given that Cassese's tenure as President of the ICTY led to some of the most widely recognised judicial creativity, including in the Appeals Chamber's Tadić jurisdiction decision,⁵⁵ it seems

⁵⁰ For a more detailed exposition see, for example, J. L. Coleman and Leiter, B., 'Legal Positivism', in *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. edited by D. Patterson (Chichester, West Sussex; Malden, MA: Wiley-Blackwell, 2010), 228-248. Pages 235-236, in particular, address questions of judicial discretion where there is not a clear answer.

⁵¹ Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?', 2.

⁵² Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?', 3.

⁵³ Isabel Feichtner, 'Realizing Utopia through the Practice of International Law', *European Journal of International Law* 23, no. 4 (2012): 1144.

⁵⁴ Feichtner, 'Realizing Utopia through the Practice of International Law', 1150-1151.

⁵⁵ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ('Tadić Jurisdiction Decision'). For criticism of this decision see Colin Warbrick and Peter Rowe, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadić Case', *The International and Comparative Law Quarterly* 45, no. 3 (1996): 699.

that that phrase is not best described in pure opposition to 'positivism' as now understood. It is clear, however, that the role of interpretation and the factors – legal or otherwise – that form part of that interpretation are key.

Judicial creativity as an interpretive strategy

As Bruce Anderson says, 'Interpretation covers just about everything that everyone in the legal profession does.'⁵⁶ Balkin states, 'The history of the law is iteration; the development of law is the development of legal materials, which are subjected to new interpretations as we read them over and over again in different factual, historical, and political contexts.'⁵⁷ As Duncan Kennedy pointed out, however, interpretation is not a neutral process.⁵⁸

Although he said it in the context of the domestic legal system of the United States of America, Robert M. Cover's comment that legal interpretation 'takes place in a field of pain and death' is particularly apt in the field of humanitarian law.⁵⁹ Decisions made as to what or who to target are 'Legal interpretive acts [that] signal and occasion the imposition of violence upon others'.⁶⁰ The interpreter

articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.⁶¹

As the judges at the ICTY were well aware, those interpreting legal texts therefore do so with immense responsibility for the effects of their decisions on others. This includes very particularly the impact of their decisions on the victims of the war as a whole and the victims of the particular crimes found to have been committed, as well as the individual defendants.

⁵⁶ Bruce Anderson, 'The Nine Lives of Legal Interpretation', *Journal of Macrodynamic Analysis* 5 (2010): 32.

⁵⁷ Jack M. Balkin, 'Deconstructive Practice and Legal Theory', *The Yale Law Journal* 96 (1987): 775.

⁵⁸ Duncan Kennedy, *A Critique of Adjudication: Fin De Siècle* (Cambridge, Massachusetts; London, England: Harvard University Press, 1997).

⁵⁹ Robert M. Cover, 'Violence and the Word', *The Yale Law Journal* 95 (1986): 1601.

⁶⁰ Cover, 'Violence and the Word', 1601.

⁶¹ Cover, 'Violence and the Word', 1601.

The next section discusses how the judges' own views may play a role in the interpretation of the law.

Political morality

Dworkin later in his career rejected both positivist and interpretivist approaches (although he used to be an interpretivist himself). He saw both as treating law and morals as separate areas whereas he had come to the conclusion that law should itself be treated as part of 'political morality'. His form of interpretation as a means of reaching the correct solution does seem, however, still to be key and involves moral judgement.⁶²

In one of his last pieces of work Dworkin states that the 'correct interpretation of an international document' requires an interpretation that 'makes the best sense of the text' in line with the 'underlying aim' of international law. He sets out his list of the aims of international law as

the creation of an international order that protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates coordination when this is essential, and provides some measure of participation by people in their own governance across the world. These goals must be interpreted together: they must be understood in such a way as to make them compatible.⁶³

Dworkin thought that a developing law requires its existence to be justified in political morality although once it was accepted 'doctrine' its basis in political morality would not need to be discussed in day to day legal argument. He saw that 'a rigid separation between legal and moral argument in the development of international law would be premature now and would accelerate its practical irrelevance'.⁶⁴

Dale Stephens gives an example of how Dworkin's interpretive approach can be seen to have been applied at the ICTY:

⁶² Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts; London, England: The Belknap Press of Harvard University Press, 2011), 405-415.

⁶³ Ronald Dworkin, 'A New Philosophy for International Law', *Philosophy & Public Affairs* 41, no. 1 (2013): 22.

⁶⁴ Dworkin, 'A New Philosophy for International Law', 30.

The increasing trend within international adjudicative jurisprudence to highlight and prioritize humanitarian considerations in LOAC, as reflected in the *Kupreškić* case, suggests a methodology different from that proffered by positivism. In the context of LOAC, the proportionality principle is a standard that admits to an open texture of discretion. In constraining that discretion by relying on the application of broad principles strongly implicates the 'reasoned elaboration' methodology often associated with Ronald Dworkin. This perspective sees law in its very essence as an interpretative enterprise. It anticipates an approach that seeks to divine meaning not through a textual excurses but rather through the identification of a set of coherent principles that underpin the law.⁶⁵

It seems Stephens considers that the judges of the ICTY were interpreting the proportionality principle under the guidance and constraint of the principle of humanity. The problem with this approach is, in Stephens' view, that it undermines 'the necessary balance between military necessity and humanity' and demonstrates 'the indeterminacy/manipulable nature of law/policy'.⁶⁶

Robert Cryer, in the context of the ICTY's development of the law of command responsibility, sees an overlap between Judge Shahabuddeen's views on the role of a judge's personal opinions and those of Ronald Dworkin. He refers to Judge Shahabuddeen's statements being reminiscent of Dworkin's position that, where there is indeterminacy in the law, a judge's personal moral views can play a role in the interpretation of the existing law so long as it does not 'undermine the integrity of the legal system'.⁶⁷

Alexander Zahar is very clear in his view, in the context of the law of internal armed conflict, that the judges at the ICTY were 'writing morality as law'.⁶⁸ He considers that judges were, in this case, finding the law to be what they thought it should be, rather than what it in fact was.

What is also interesting is how Zahar sees the work of the ICTY directly assisting the ICRC in 'driving' the development of international humanitarian law; and both utilising customary

⁶⁵ Dale Stephens, 'Blurring the Lines: The Interpretation, Discourse and Application of the Law of Armed Conflict', *Yearbook of International Humanitarian Law* 12 (2009): 106.

⁶⁶ Stephens, 'Blurring the Lines: The Interpretation, Discourse and Application of the Law of Armed Conflict', 106.

⁶⁷ Robert Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake', in *Judicial Creativity at the International Criminal Tribunals*, eds. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2010): 181-182.

⁶⁸ Alexander Zahar, 'Civilizing Civil War: Writing Morality as Law at the ICTY' in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, eds. Bert Swart, Alexander Zahar and Göran Sluiter (Oxford: Oxford University Press, 2011).

international law as a means by which to develop the law.⁶⁹ He strongly criticises the process of identification of the contents of customary law typified by the approach in the *Kupreškić et al* case, where perceived *opinio juris* is given a stronger role than state practice in the name of the ‘maximization of civilian protection’ in filling gaps in the law.⁷⁰

Darryl Robinson points to ‘victim focused teleological reasoning’ on the part of judges applying international criminal law. He states that

Notwithstanding the general declarations offered by ICL, examination reveals that a technique commonly used in ICL is (i) to adopt a purposive interpretive approach; (ii) to assume that the exclusive object and purpose of an ICL enactment is to maximise victim protection; and (iii) to allow this presumed object and purpose to dominate over other considerations, including if necessary the text itself.⁷¹

Robinson is strongly of the view that the judges were acting to ensure the law was used for the protection of victims, even if this was not the ordinary meaning of the text. Although this is all based on good intentions, Robinson highlights that it works to undermine the requirements of a fair criminal justice system.⁷² This and other concerns regarding judicial creativity in the criminal law context are discussed next.

⁶⁹ Zahar, ‘Civilizing Civil War: Writing Morality as Law at the ICTY’, 475.

⁷⁰ Zahar, ‘Civilizing Civil War: Writing Morality as Law at the ICTY’, 484. Zahar states:

An aspiration to fill gaps in the law—to legislate from the bench—is often the only method discernible in the Tribunal's efforts to prove the existence of a rule of customary law. A notorious example of this sanctimonious approach, in which the ends justify the means, is found in the *Kupreškić et al* case, which at trial level was presided over by Professor Cassese. The particular issue was whether military reprisals against civilians are prohibited in customary international law. Ignoring contrary state practice, the court sought to rely on the so-called Martens clause....

No thought is given here to the possibility that military manuals articulate state policy rather than international law. There is a distinct lack of concern about the fact that the court's use of the manuals is selective. Nor does the court show any awareness that Resolutions of the UN General Assembly can be political and aspirational instruments that do not always purport to state the law. What seems to matter most to the court, instead, is the maximization of civilian protection.

(Zahar, ‘Civilizing Civil War: Writing Morality as Law at the ICTY’, 483-484.)

⁷¹ Darryl Robinson, ‘The Identity Crisis of International Criminal Law’, *Leiden Journal of International Law* 21, no. 4 (2008): 934.

⁷² Robinson, ‘The Identity Crisis of International Criminal Law’, 961-963.

It should be noted that 'judicial creativity' has a somewhat negative connotation even when it is being mobilised in order to reach a 'just' decision. Darcy asks whether 'the expansive treatment of the law of war crimes is in keeping with the principle of *nullum crimen sine lege* and the traditional international lawmaking process'.⁷³

In addition, Robert Cryer points out that the ICTY is applying criminal law which 'is (and ought to be) subject to more stringent standards of interpretation than other areas of international law'.⁷⁴ This is because, as Robert M. Cover was pointing out in the quotes above, the finding of guilt under criminal law results in punitive action being taken against the accused, an individual who will lose their freedom. The seriousness of the consequences of a finding of guilt require protection of the rights of the accused.

As regards the principle of *nullum crimen sine lege* (the prohibition of retroactive effect of law), or the broader principle of legality, there is a potentially fundamental problem with judicial creativity when contrasted with the basic tenets of what a fair criminal system should entail. Noora Arajärvi considers the principle of legality in the context of the use of customary law by the international tribunals pointing out that the 'uncodified' nature of customary international law gives the judges applying it 'great discretion over the specific substance of rules to be applied' with the consequent risk that they will exceed the 'constraints imposed by the principle of legality'.⁷⁵

Robinson is clear that '[t]he problem with victim focused teleological reasoning is that it conflates the 'general justifying aim' of the criminal law system as a whole...with the question of whether it is justified to punish a particular individual for a particular crime'.⁷⁶ Mia Swart argues, however, that 'law-making' by judges in the context of 'gaps' in a new legal system

⁷³ Shane Darcy, 'The Reinvention of War Crimes by the International Criminal Tribunals', in *Judicial Creativity at the International Criminal Tribunals*, eds. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2010): 107.

⁷⁴ Robert Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake', 23.

⁷⁵ Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (London: Routledge, 2014), 122.

⁷⁶ Robinson, 'The Identity Crisis of International Criminal Law', 938.

such as that of international criminal law as applied by the ICTY 'can be a matter of *necessity*' as well as 'desirable and inevitable'.⁷⁷

The next section considers the potential factors that may be influencing the judges in cases where there is room – or a gap – for interpretation or judicial creativity.

What factors play a role in judicial creativity?

There are many factors potentially involved in judicial creativity. It is widely agreed, for example, that the international war crimes tribunals set up to date are political creatures.⁷⁸ All the cases at the ICTY took place in a 'highly politicized context'.⁷⁹ This included accusations that the ICTY was pursuing a particular political agenda in the selection of those to be prosecuted.⁸⁰ Some of those charged, including Gotovina, were celebrated as national heroes in their own countries for their role in the conflict and gained a broader political importance in the relationship between the ICTY, countries outside the Former Yugoslavia and their own country.⁸¹ Outright claims of outside political influence on judicial decision making were made, including by a judge of the ICTY, Judge Harhoff. Judge Harhoff believed that there had been political pressure put on certain judges to influence the development of some elements of the law. He went so far as to voice his concern about this in private correspondence which was leaked to the public.⁸²

This study does not consider the politics of the judges and judgments in the sense of pressure being applied by external actors, however, it is clear that the judges do not come to the courtroom as blank canvases. As Smith states in relation to the Nuremberg IMT:

⁷⁷ Mia Swart, 'Gap-Filling as Law-Making: The Examples of the Ad Hoc International Criminal Tribunals', in *Select Proceedings of the European Society of International Law: Volume 2 (2008)*, eds. Hélène Ruiz Fabri, Rüdiger Wolfrum and Jana Gogolin (London: Hart Publishing, 2010), 314.

⁷⁸ See, for example, Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Westport, Connecticut; London: Praeger Security International, 2006).

⁷⁹ Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law Politics and Diplomacy* (Oxford: Oxford University Press, 2004), 10.

⁸⁰ Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law Politics and Diplomacy*, 180.

⁸¹ See, for example, Vjeran Pavlaković, 'Croatia, the International Criminal Tribunal for the Former Yugoslavia, and General Gotovina as a Political Symbol', *Europe-Asia Studies* 62, no. 10 (2010): 1707-1740.

⁸² See <https://www.ejiltalk.org/danish-judge-blasts-icty-president/> (last accessed 16.06.2019)

If the Nuremberg situation is any bellwether, the elevation of the judicial process to the level of international politics does nothing to increase its consistency or efficiency. Judges cannot transcend the views of their own time and society, nor do they abandon the prejudices that they use in their daily lives at home.⁸³

The individual experience, characteristics and beliefs of the judges will clearly play a role in carrying out their work; even simply to the extent that they have a preference for a conservative approach or a more creative one. What sings from the pages of *Reaching Judgment at Nuremberg* is the importance of each judge's approach to the challenges facing them, from establishing their role in the courtroom to deciding on the highly complex legal questions and then the level of responsibility of the defendants. Each judge's personal characteristics and beliefs – particularly their views on how legal matters should be approached – as well as their actual knowledge and experience were all important. The judges were concerned about their own 'legal reputations' as well as the judicial process itself:

None of the eight judges seems to have had the slightest doubt that the defendants were men who deserved severe punishment, but this attitude, paradoxical as it may sound, was not a decisive factor. As Biddle and Parker realized early, their central problem as Tribunal members was to try to reach a publicly acceptable verdict while upholding a charter with a shaky basis in international law. They wanted to leave this situation with legal reputations and the judicial process intact. In short, not just the judges' biases against the defendants, but their attitude toward legal process and the situation's complexities were the decisive factors.⁸⁴

Guido Acquaviva states in relation to Judge Antonio Cassese, one of the judges behind the Tadić Jurisdiction Decision, 'Law was not something abstract and cold, to him - it was one of the ways to improve the human lot, and he definitively was interested in anything related to humankind.'⁸⁵ Judge Harhoff's famous letter demonstrated, if nothing else, that there was a suspicion on the part of at least one judge that the work of the tribunal, including that in the Gotovina Appeal Judgement, may have been being bent towards a politically motivated goal held by Judge Meron.⁸⁶ What is interesting here is that Judge Cassese clearly had a political agenda too. It was just that it was in line with expanding the remit of the ICTY and not the pulling back that was charged against Meron.⁸⁷

⁸³ Smith, *Reaching Judgment at Nuremberg*, 304-305.

⁸⁴ Smith, *Reaching Judgment at Nuremberg*, 76.

⁸⁵ Acquaviva, 'A Conversation with Antonio Cassese', 815.

⁸⁶ See <https://www.ejiltalk.org/danish-judge-blasts-icty-president/> (last accessed 16.06.2019)

⁸⁷ See Dov Jacobs' comments in this regard at <https://dovjacobs.com/2013/06/14/follow-up-on-the-reactions-to-the-harhoff-letter/> (last accessed 16.06.2019)

One key factor that is repeatedly identified in the literature as a motivation of the judges at the ICTY in general is that of a desire to protect civilians (as, for example, suggested by Robinson).⁸⁸ This is also described as a desire to further the 'principle of humanity'. For example, in the context of the law governing internal armed conflicts, and under the heading 'the sentimental roots of ICTY law', Zahar states that '[o]ver the almost two decades since the Tribunal's establishment, during which the states have kept silent, the ICTY judges have built a legal structure consistent with the ICRC's humanitarian ideal.'⁸⁹

The principle of humanity is considered by most to be a fundamental part of IHL, usually described within its cornerstone relationship with 'military necessity'. The next section considers what this 'principle of humanity' or 'humanitarian ideal' might mean. After this the relationship between the 'principle of humanity' and 'military necessity' is considered.

The principle of humanity

What 'humanity' means is as wedded to the age and context in which it is deployed as any other. Larissa Fast sets out that the initial legal sense of 'humanity' contained in the first Geneva Convention was a reference 'primarily and even exclusively to wounded soldiers, thus reflecting the reigning European prejudices of the day'.⁹⁰ Fast also warns that it is the emphasis on one side's own exclusive 'humanity' that can lead to the circumstances enabling violence against the de-humanised enemy.⁹¹

The International Court of Justice have held that 'the principles and rules of law applicable in armed conflict - at the heart of which is the overriding consideration of humanity - make the conduct of armed hostilities subject to a number of strict requirements'.⁹² The principle of 'humanity' is the first of seven fundamental principles governing the work of the ICRC.⁹³ It has

⁸⁸ Robinson, 'The Identity Crisis of International Criminal Law'.

⁸⁹ Zahar, 'Civilizing Civil War: Writing Morality as Law at the ICTY', 503.

⁹⁰ Larissa Fast, 'Unpacking the Principle of Humanity: Tensions and Implications', *International Review of the Red Cross* 897/898 (2015): 114.

⁹¹ Fast, 'Unpacking the Principle of Humanity: Tensions and Implications', 114.

⁹² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226 ('Nuclear Weapons Advisory Opinion'), Paragraph 95.

⁹³ <https://www.icrc.org/en/fundamental-principles> (last accessed on 26.02.2019)

not, however, been clearly defined by the ICRC and can be seen to have more than one interpretation.⁹⁴ In 2001, Robin Coupland concluded:

At present, the meaning of humanity is ambiguous. It is currently perceived as little more than a source of international law with tenuous links to natural law. This ambiguity has led to a failure to recognize humanity as a continuing and powerful influence on international law and as the only valid objective of that law. It is therefore denied a place in legal dialogue.⁹⁵

In his textbook, Yoram Dinstein set out that the ‘principles of humanity’ are not equivalent to the principle sources of law, custom and treaties (the ‘strata’ of the law as he describes them), but they ‘may foster the evolution of’ the law.⁹⁶

Other authors have identified an increase in the emphasis on humanity in the development of international law, and IHL in particular. Theodor Meron pointed out that the law of war has always been concerned about the ‘protection of persons’ as well as the rights of states, that is, it has always had a ‘humanizing strand’ but it was the influence of the Universal Declaration of Human Rights and other post-Charter human rights treaties and declarations that ‘explain the focus of the Geneva Conventions and Additional Protocols on individuals and populations’.⁹⁷ Robert Kolb traces four epochs of modern IHL, the latter two of which he describes as ‘(1949-1993): the humanitarian age of the Geneva Conventions of 1949’ and ‘(1993 to date): a phase of progressive ‘humanisation of IHL but also loss of autonomy’.⁹⁸ The year 1993 was chosen as

⁹⁴ See the description of the use and definition of ‘humanity’ as a Fundamental Principle of the ICRC and in the Martens Clause in the Hague Convention (IV) adopted by the Peace Conference of 1907 in Robin Coupland, ‘Humanity: What is it and how does it Influence International Law?’, *International Review of the Red Cross* 83, no. 844 (2001): 972-977. See also Fast, ‘Unpacking the Principle of Humanity: Tensions and Implications’, 111.

⁹⁵ Coupland, ‘Humanity: What is it and how does it Influence International Law?’, 988.

⁹⁶ Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 14-15.

⁹⁷ Theodor Meron, ‘The Humanization of Humanitarian Law’, *The American Journal of International Law* 94, no. 2 (2000): 245. Meron goes on to state that

The renaissance of the law of war in the early 1970s was triggered by human rights, and especially by the reports of the UN Secretary-General on respect for human rights in armed conflict and the Tehran Conference on human rights of 1968. Law of war experts have recognized that the development of international humanitarian law had approached stagnation before the influence of the human rights movement was brought to bear. (Theodor Meron, ‘The Humanization of Humanitarian Law’, *The American Journal of International Law* 94, no. 2 (2000): 247.)

⁹⁸ Robert Kolb, ‘The Main Epochs of Modern International Humanitarian Law since 1864 and their Related Dominant Legal Constructions’, in *Searching for a ‘Principle of Humanity’ in International Humanitarian Law*, eds. Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (Cambridge: Cambridge University Press, 2012), 23-71.

the start of the fourth epoch due to the establishment of the ICTY, 'a rebirth of international criminal law'.⁹⁹

Ruti Teitel describes the instability of the international system following the collapse of communism as leading to the increasing significance of human security and the development of 'humanity's law':

In an unstable and insecure world, the law of humanity—a framework that spans the law of war, international human rights law, and international criminal justice—reshapes the discourse of international relations.¹⁰⁰

Teitel identified a trend whereby courts and tribunals faced with 'interpreting and elaborating the law of humanity' have had to address conflicts and gaps in the sources of this law and in so doing have 'expanded rights and responsibilities to encompass wider and wider circles of conduct, and additional actors within conflicts'. Teitel also notes a trend of 'less deference to the to the traditional sovereign prerogatives of states, where doing so would interfere with the overriding goal of protecting persons and peoples.'¹⁰¹

Given all the above opinion as to the role of 'humanity' in the development of the law, the next section considers the relationship of humanity to another fundamental principle of the laws governing war: military necessity.

Humanity and military necessity

Yoram Dinstein describes 'military necessity' and 'humanitarian considerations' as the two opposing 'driving forces energizing the motion of' the law of international armed conflict.¹⁰² To Dinstein, this law 'is, and must be, predicated on a subtle equilibrium between the two diametrically opposed stimulants of military necessity and humanitarian considerations'.¹⁰³ Dinstein uses the term 'humanitarian considerations' as opposed to 'principle(s) of humanity'

⁹⁹ Kolb, 'The Main Epochs of Modern International Humanitarian Law since 1864 and their Related Dominant Legal Constructions', 52.

¹⁰⁰ Ruti G. Teitel, *Humanity's Law* (Oxford University Press, 2011), 4.

¹⁰¹ Teitel, *Humanity's Law*, 4.

¹⁰² Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 8.

¹⁰³ Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 9.

purposefully as he does not consider there to be a 'principle of humanity' that is a binding legal norm or obligation as opposed to an 'extra-legal consideration'.¹⁰⁴

Dinstein singles out the *Kupreškić et al.* judgment of the ICTY for criticism and, in particular, Judges Cassese, May and Ndebele Mwackande Mumba's suggestion as to the potential use of the 'principles of humanity' and 'dictates of public conscience' which form part of the Martens Clause.¹⁰⁵ These judges in this case suggested that although the 'principles of humanity' and 'dictates of public conscience' incorporated in the Martens Clause were not independent sources of international law they could, for example, be utilised in an assessment of cumulative attacks on military objectives causing incidental damage to civilians; where each attack was potentially lawful but where the 'cumulative effects' might not be in keeping with the overall principles of humanity such attacks may breach international law.¹⁰⁶

One point that other writers have taken up, however, is that it is far from clear that military necessity and humanity are in fact diametrically opposed concepts. Yishai Beer argues that necessity and humanity are not polar opposites.¹⁰⁷ Military necessity, in his view could complement humanitarian purposes through its power to 'restrict brutality in the exercise of military force' given that '[e]xcessive use of force is not a professional requirement of a military; the mere fact that it happens in many wars does not mean that it has any military substance or basis.'¹⁰⁸

As mentioned in the Overview above, David Luban describes two different interpretive communities who have, on the whole, adopted an adversarial position to each other: those in the military who start from the viewpoint of military necessity (LOAC version) and those humanitarian lawyers who start from the viewpoint of the principle of humanity (IHL version).¹⁰⁹ In his view these two viewpoints reflect a potential indeterminacy in the law

¹⁰⁴ Yoram Dinstein, 'The Principle of Proportionality', in *Searching for a 'Principle of Humanity' in International Humanitarian Law*, eds. Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (Cambridge: Cambridge University Press, 2012), 73.

¹⁰⁵ Case No. IT-95-16, *Prosecutor v. Kupreškić et al.*, Trial Chamber Judgement of 14 January 2000, at paragraphs 525-526.

¹⁰⁶ Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 14.

¹⁰⁷ Yishai Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity', *European Journal of International Law* 26, no. 4 (2016): 801-828.

¹⁰⁸ Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity', 804.

¹⁰⁹ David Luban, 'Military Necessity and the Cultures of Military Law', *Leiden Journal of International Law* 26, no. 2 (2013): 315-349.

itself.¹¹⁰ In Luban's view the international tribunals have given 'visible structure and focus' to a broader change in how the laws of war are seen by society, that 'public scrutiny and accountability are a fact of life, and at bottom they represent a larger truth...: the civilian world has staked a claim to the laws of war that is not going to go away, and that should not go away. The laws of war are now common property.... To the degree that the IHL version of the laws of war articulates concern about civilians that the LOAC version downplays, the IHL version sets the legal standard, not only the political standard.'¹¹¹

Luban argues in conclusion, however, that

properly understood, military necessity itself requires taking civilian interests into account.... the indeterminacy may not be as complete as I suggested. To the extent the LOAC version treats military necessity as a strictly technical limit on humanitarian concerns, it misunderstands military necessity; and, understanding it correctly, the possibility exists for convergence between the two cultures.¹¹²

Luban's idea of the possibility of 'convergence between the two cultures' is striking given the results of this research. As is discussed in Chapter 3 (Law), the judges have seemed to be on the IHL side of the line by prioritising the viewpoint of the ICRC, however, they have also had serious regard for the views of the military practitioners appearing as witnesses before them (as will be highlighted in Chapters 4 and 5 (Evidence I and II)).

The next section will introduce the mechanism by which questions of judicial creativity became particularly relevant to the law of targeting, namely through the role given to the international customary law governing criminal breaches of the laws and customs of war.

Judicial creativity and the law of targeting

As Darcy highlights, it is in relation to the violations of the laws and customs of war (Article 3) rather than grave breaches of the 1949 Geneva Conventions (Article 2) that there has been the more significant judicial creativity, leading to the 'expansion of the scope of the law of war

¹¹⁰ Luban, 'Military Necessity and the Cultures of Military Law', 318.

¹¹¹ Luban, 'Military Necessity and the Cultures of Military Law', 338.

¹¹² Luban, 'Military Necessity and the Cultures of Military Law', 339.

crimes and the identification of new offences not previously established in positive international law'.¹¹³

A key point regarding Article 3 of the ICTY Statute was that it was drafted so as to be a non-exhaustive list. This gave the OTP the chance to bring charges for and the judges the opportunity to consider alleged breaches of other laws and customs of war incurring individual criminal responsibility. Darcy describes this as an 'interpretative licence'¹¹⁴ for the judges and as he states, although omitting to mention the key role of the OTP:

The law of war crimes is arguably where the *ad hoc* Tribunals have made their most significant and far-reaching contribution to the development of international criminal law. While the Security Council-created statutory instruments provided a platform for the Tribunals' judges to address violations of the laws of armed conflict, it was the judiciary itself which expanded the scope of the concept of war crimes and expounded on the meaning and content of numerous individual crimes of war.¹¹⁵

This opportunity to develop (or exercise judicial creativity in relation to) the law of targeting was dependent on the identification of laws and customs of war (not enumerated in Article 3 of the ICTY Statute) that were binding on the parties to the conflict at the time of the offences alleged. The Appeals Chamber in their *Tadić* Jurisdiction Decision held that the conditions that must be satisfied for a violation of international humanitarian law not listed within Article 3 to be subject to that article and therefore capable of being prosecuted before the ICTY were:¹¹⁶

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met...;
- (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim...
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

The key opening for the 'interpretive licence' was the very nature of customary international law. It is difficult to set out the precise contents of the rules of customary law at any given time given that it is a law that can evolve based on the practice and opinion of all the states in the

¹¹³ Darcy, 'The Reinvention of War Crimes by the International Criminal Tribunals', 107.

¹¹⁴ Darcy, 'The Reinvention of War Crimes by the International Criminal Tribunals', 111.

¹¹⁵ Darcy, 'The Reinvention of War Crimes by the International Criminal Tribunals', 107.

¹¹⁶ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 94.

world. Its contents cannot be fixed as it can change as state practice and opinion ebb and flow. The customary law relevant to the law of targeting is discussed in detail in Chapter [3] (Law).

Robert Kolb gives an idea of the nature of customary international law in describing its role in the innovative work of the judges of the ICTY:

The overall assessment of the tribunal's work has to be that it did a pioneering task; that it affirmed, shaped and developed the law on many aspects, for example with the creation of a category of war crimes in non-international armed conflicts, through the somewhat benevolent lens of mobile customary international law norms; and that it did justice in many individual cases.¹¹⁷

This study sought to identify the influences on the work of the judges, testing Kolb and others' assessments, in the particular context of the law of targeting. That is, it looked to questions of judicial creativity and the application of the principle of humanity in the judges' definitions of the law, use of the evidence and findings of criminal responsibility or innocence. In finding a strong role for the principle of humanity, it also found the means by which the military viewpoint (although not military necessity as such) was applied by the judges.

The next section (Method) sets out how this investigation was put into practice.

Method

This study attempts to bring a social scientific approach to the legal analysis and investigation of how the judges were applying the law of targeting, to try to capture a broader range of factors than a standard legal analysis. The judges' decisions and decision making were, by the very fact of the absence of clear answers in existing law to all the questions asked of them, influenced by many factors and the broader social science outside traditional legal analysis can facilitate the study of such activity.

This research is based on the acceptance that judicial creativity has played a significant role at the ICTY and therefore does not subscribe to a formal positivist view. It sees that the judges have an interpretive role in situations where the law is unclear; this means that at times there will be room for influences other than the law itself on their decisions. In using a qualitative

¹¹⁷ Robert Kolb, 'Gotovina and the ICTY', *Swiss Review of International and European Law* 27, no. 4 (2017), 483.

content analysis approach the intention is to make explicit what is usually done implicitly/unconsciously in legal case analysis. It is also seen as a means through which the role of the judges in developing the law can be described as well as the factors playing a role in this identified.

This research used a method combining traditional legal analysis with a broader qualitative analytic research method which is described below. Through adopting this approach certain themes arose which were not pre-planned and the nuances of the witnesses and their testimony came to the fore. The witnesses, through their testimony and in its incorporation into the judgments, were key to this research. The witnesses and their testimony before the judges of the ICTY are therefore introduced in detail in Chapter 4 (Evidence I: The witnesses).

The questions raised by this research were answered through a detailed consideration of materials arising from three cases brought before the judges at the ICTY, namely those of *Blaškić*,¹¹⁸ *Galić*¹¹⁹ and *Gotovina et al.*¹²⁰ These judgments were selected as the basis for this study as they cover a range of the complex legal issues faced by those asked to judge certain conduct that has taken place on the battlefield. They arise from different geographical areas of the conflict and from contrasting military operations but all three include charges against soldiers for the way in which they had conducted military operations. In particular, the concept of 'unlawful attacks' arises in all three judgments and therefore the law of targeting that is the focus of this study.

This research makes use of the unusually open, easily accessible and large online record of the work of the ICTY, described by one historian as a 'vast, incredibly rich archive'.¹²¹ In particular, it has utilised the publicly available witness testimony in these cases. The recorded testimony of even a small fraction of the witnesses of the Yugoslav conflict gives a vivid insight into that conflict and the lives and deaths of the people that these cases are ultimately about. The transcription of the varied proceedings in the courtroom gives an idea of the challenges of the

¹¹⁸ Case No. IT-95-14, *Prosecutor v. Tihomir Blaškić*, Trial Chamber Judgement of 3 March 2000 ('*Blaškić* Trial Judgement') and Appeals Chamber Judgement of 29 July 2004 ('*Blaškić* Appeal Judgement')

¹¹⁹ Case No. IT-98-29, *Prosecutor v. Stanislav Galić*, Trial Chamber Judgement of 5 December 2003 ('*Galić* Trial Judgement') and Appeals Chamber Judgement of 30 November 2006 ('*Galić* Appeal Judgement')

¹²⁰ Case No. IT-06-90, *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Trial Chamber Judgement of 15 April 2011 ('*Gotovina* Trial Judgement') and Appeals Chamber Judgement of 16 November 2012 ('*Gotovina* Appeal Judgement')

¹²¹ Iva Vukusic, 'Assessing the ICTY's Legacy', Blogpost posted 26/06/2017 at (<http://blogs.kcl.ac.uk/warcrimes/2017/06/26/assessing-the-ictys-legacy/>) (last accessed on 18/01/2018).

day to day existence of the ICTY as a functioning court; the problems addressed by the judges and the relationships between the participants.

To answer the research question the relevant parts of the trial and appeal judgements and transcripts of hearings from each case were analysed. This involved a textual analysis using pre-set codes of themes linked to various aspects of the law of targeting to code the text in NVivo. During this process new ideas and concepts arose and were incorporated into new codes and investigated further. The perceived dichotomy of the principles of 'humanity' and those of the 'military' was an initial guiding framework although, as became apparent, it was not as stark as might have been imagined.

The following sections provide more detail on how the research was conducted.

Research questions

The overarching research question of this project was how had the judges in certain cases at the ICTY implemented the law of targeting and, given this, could any factor(s) be identified as having influenced the many decisions on law, evidence and responsibility they had to make in reaching their judgments? In order to answer this question, the following questions based on the breakdown of law, evidence and responsibility were asked:

Law

1. What legal decisions did the judges make in relation to the law of targeting?
2. How was the law identified?
3. How did these decisions reflect a development of the law of targeting, if any?
4. Can any factors be identified as influencing or driving these decisions? In particular, has the role of the principle of humanity, discussed in the literature, been a factor in the law of targeting as it has been seen to be for other areas of the development of the law.

Evidence

5. How did the judges apply the law to the facts before them?
6. What evidence, or type of evidence, was most important?

Responsibility

7. What exactly was the role of those charged and found responsible, or not, for targeting offences? That is, what were they found to have – or not to have done – exactly?
8. Were there any key factors that led to findings of guilt or innocence in relation to their conduct?

Questions 1. to 4. form the basis of Chapter 3 on Law, questions 5. and 6. form the basis of Chapters 4 and 5 on Evidence and questions 7. and 8. form the basis of Chapter 6 on Responsibility.

A note on language and documents at the ICTY

The Tribunal worked in several different languages with various requirements for interpretation and translation. The Conference and Language Service Section ('CLSS') was responsible for all interpretation and translation. The CLSS also employed the court reporters to take transcripts of the hearings.¹²² Interpreters worked in real time as an integral part of the courtroom with the proceedings being heard in at least 3 languages (Bosnian/Croatian/Serbian ('BCS'), Albanian or Macedonian, French and English).¹²³ Translators translated documents for presentation of evidence before and alongside the cases.

The judges (as well as the many others involved) were not necessarily working in their native languages in the courtroom or in their judgements. Many of the judges were multilingual, for example, all of the trial judges in Galić could speak and read both English and French as well as their native languages, but none could read or speak B/S/C. This has to be borne in mind when analysing the transcripts and judgements themselves. This is particularly relevant to any detailed consideration of the construction of the language – which would, among other things, need to look into translation/language correlation across different languages.¹²⁴

¹²² <http://www.icty.org/en/about/registry/translation-and-interpretation> (last accessed 14.06.2018)

¹²³ <http://www.icty.org/en/about/registry/translation-and-interpretation> (last accessed 14.06.2018)

¹²⁴ See Jan Engberg, 'Chapter 12: Word Meaning and the Problem of a Globalized Legal Order'; Susan Šarčević, 'Chapter 13: Challenges to the Legal Translator'; and Susan Berk-Seligson, 'Chapter 30, Linguistic Issues in Courtroom Interpretation' (in particular, 30.3 Interpreting in Trial Court) in *The Oxford Handbook of Language and Law*, eds. Peter M. Tiersma and Lawrence M. Solan (Oxford, New York: Oxford University Press, 2012).

The judgments themselves are directed by the various judges but written and produced by a team, which includes judges' assistants, rather than a single judge. As Lawrence Solan points out, the presentation of a decision in a judgment may not always fully reflect the difficulty of the decision itself or even the actual main reasons for the decision.¹²⁵ Judges are under pressure to 'speak decisively' and to rely upon the relevant existing body of law (also described by Solan as following 'legitimate process'), leading to the potential in difficult cases for the reporting of their reasons 'less than fully and openly'.¹²⁶

The transcripts of the hearings are not full representations of the trials. Some parts are heard in complete secrecy, usually for reasons of witness protection, and although there may be some reference to these witnesses and/or their evidence in the judgements, their places in the transcript remain blank.¹²⁷

The level of consideration of language required by a linguistics based study is outside the scope of this research but these points have to be noted and this research will aim to interpret what has been written and said bearing in mind these caveats, reading the words on the paper, at relative face value, to be those intended by the judges.

Approach from social science – qualitative content analysis

It appears that although the mechanics and effects of the legal system and its legislation have often been analysed from a social science perspective, the practice of legal analysis from case law has not – even though this form of legal research can itself be seen as a qualitative research process. As Lisa Webley states, '[m]any common law practitioners are unaware that they undertake qualitative empirical legal research on a regular basis – the case-based method of establishing the law through analysis of precedent is in fact a form of qualitative research

¹²⁵ Introduction and generally of Lawrence M. Solan, *The Language of Judges* (Chicago; London: The University of Chicago Press, 1993).

¹²⁶ Solan, *The Language of Judges*, 3.

¹²⁷ See <http://www.icty.org/en/about/registry/courtroom-technology> (last accessed 24.06.2019) for a description of how the court recorder transcribing proceedings fits into the broader audio-visual set up of each of the courtrooms at the ICTY. Rules 75 and 79 of the ICTY RPE provide for the protection of witnesses within proceedings and Rule 81 ICTY RPE provides for 'Records of Proceedings and Evidence'.

using documents as source material' she does not elaborate on this and goes on to look to qualitative research of other elements of the legal system.¹²⁸

Documents are commonly used as sources of qualitative research.¹²⁹ The precise form which analysis of these documents takes is, however, much harder to specify. Discourse Analysis and Grounded Theory are specific strategies of analysis commonly linked to qualitative research based on documentary sources but neither is a good match for the type of research that is proposed here. Discourse Analysis requires much more emphasis on understanding the nature and construction of language than would have fit this study. Grounded Theory requires the use of a very specific approach and technically involves a starting point clear of any pre-existing theoretical framework, which is not the case here.¹³⁰ The best fit for this project was seen as a more general qualitative analytic approach best described as qualitative content analysis.

Margrit Schreier describes qualitative content analysis as 'a method for systematically describing the meaning of qualitative data'. She states that '[t]hree features characterize the method: qualitative content analysis reduces data, it is systematic, and it is flexible.'¹³¹ In terms of its flexibility as an approach, Schreier describes qualitative content analysis as 'typically' combining both concept-driven and data-driven categories in its coding frame; the data-driven categories ensure that the coding frame 'provides a valid description of the material'.¹³²

This approach of qualitative content analysis is to be distinguished from *quantitative* content analysis although Schreier is of the view that there is no sharp dividing line between the two.¹³³ Webley describes a content analysis 'inclined towards' qualitative interpretation using 'purposive sampling, less quantification and more interpretation in their development of codes

¹²⁸ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research', in *The Oxford Handbook of Empirical Legal Research*, eds. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2010), 927.

¹²⁹ See, for example, Amanda Coffey, 'Chapter 25: Analysing Documents', in *The SAGE Handbook of Qualitative Data Analysis*, ed. Uwe Flick (London: SAGE Publications, 2013)

¹³⁰ See, for example, Tim Rapley, *Doing Conversation, Discourse and Document Analysis* (London: SAGE Publications, 2007), William Gibson and Andrew Brown, *Working with Qualitative Data* (London: SAGE Publications, 2009), James Paul Gee, *Introduction to Discourse Analysis: Theory and Method* (Taylor & Francis Group, 2011) and Marianne W. Jorgensen and Louise J. Phillips, *Discourse Analysis as Theory and Method* (London: SAGE Publications, 2002).

¹³¹ Margrit Schreier, 'Chapter 12: Qualitative Content Analysis', in *The SAGE Handbook of Qualitative Data Analysis*, ed. Uwe Flick (London: SAGE Publications, 2013), 170.

¹³² Schreier, 'Chapter 12: Qualitative Content Analysis', 171.

¹³³ For example, findings in both 'can include frequency counts': Schreier, 'Chapter 12: Qualitative Content Analysis', 173.

and their treatment of those codes'.¹³⁴ It is the emphasis on the interpretation and judgement of the interpreter in selecting samples and selecting, developing and analysing the codes that distinguishes this from a quantitative approach, even when using computer software such as NVivo to carry out the research. Given the interpretive nature of this type of enquiry, the sampling method and validity of the coding will require more justification than other forms of qualitative research.¹³⁵

The qualitative content analysis approach was chosen as a slightly different approach to legal analysis through providing a more explicit breakdown of the information contained in the judgments rather than a radical departure from legal case analysis. It is hoped that it will provide a more detailed case analysis than has previously been provided for these selected judgments.

Schreier sets out that the 'heart' of the qualitative content analysis method is the 'coding frame'; building this coding frame involves 'selecting material; structuring and generating categories; defining categories; revising and expanding the frame.'¹³⁶ The next sections set out how material was selected and coding carried out for the purposes of this study.

Identification of specific relevant material for analysis

The cases forming the core of this research have been selected as they are those heard before the ICTY that most directly address the law relating to targeting, in particular due to the positions of the defendants within their respective militaries as well as the questions the charges against them raised relating to the use of the troops and weaponry available to them. The legal cases that were made against each accused are described in more detail in Chapters 2 and 6 (Framework and Responsibility); what follows is a short introduction to the factual basis of each case:

- Tihomir Blaškić was a professional soldier and commander of the armed forces headquarters in central Bosnia of the Croatian Defence Council ('HVO') of the Croatian Community of Herceg-Bosna ('HZ-HB'). According to the prosecution, he was 'a career

¹³⁴ Webley, 'Qualitative Approaches to Empirical Legal Research', 939.

¹³⁵ Webley, 'Qualitative Approaches to Empirical Legal Research', 940.

¹³⁶ Schreier, 'Chapter 12: Qualitative Content Analysis', 174.

military officer who graduated from the Military Academy in Belgrade in 1983 and formerly served as a Captain First Class in the Yugoslav People's Army (JNA).¹³⁷ He was prosecuted for his alleged role in serious violations of international humanitarian law committed against Bosnian Muslims from May 1992 to January 1994 by members of the armed forces of the HVO in the Lašva Valley region of central Bosnia against the background of an ongoing armed conflict between the HVO and the Bosnian Muslim Army.¹³⁸ A key part of this aspect of the conflict was a military struggle for control of the strategic Lašva Valley and surrounding areas,¹³⁹ but this was intertwined with the 'political' objective of removal of the Bosnian Muslims from the area, that is, their ethnic cleansing.¹⁴⁰

- Stanislav Galić was prosecuted for his role in the internationally publicised and condemned siege of Sarajevo by the Bosnian Serb Army ('VRS').¹⁴¹ Galić too was a professional soldier, appointed commander of the Sarajevo Romanija Corps ('SRK') on 7 September 1992, taking up the position on 10 September 1992 and being promoted to the rank of Major General in November 1992. He remained in this position until 10 August 1994.¹⁴² Galić reported directly to the Chief of Staff of the VRS, General Ratko Mladić. The prosecution case was not that the 'siege' itself was unlawful but that alongside a legitimate military operation there was also an unlawful campaign of shelling and sniping unlawfully directed against the civilian population.¹⁴³
- Ante Gotovina, Mladen Markač and Ivan Čermak were prosecuted for their part in Operation Storm, the military campaign launched by the Croatian government in order to re-take control of the area the Croatian Serbs had declared as being the Serbian Autonomous District of Krajina, and later the Republic of Serbian (Srpska) Krajina ('RSK'), from the RSK military force known as the Srpska Vojska Krajine (Serbian Army of Krajina or 'SVK'). The Trial Chamber found that at the time of the acts referred to in the indictment, Gotovina held the rank of Colonel General in the Armed Forces of Croatia, the Hrvatska

¹³⁷ *Blaškić* Second Amended Indictment of 25 April 1997, paragraph 2.

¹³⁸ *Blaškić* Trial Judgement, paragraph 9.

¹³⁹ Central Intelligence Agency, *Balkan Battlegrounds Volume 1* (Washington: CIA, 2002), 191-193.

¹⁴⁰ See, for example, Eric Gordy, 'The Blaškić Trial: Politics, the Control of Information and Command Responsibility', *Southeastern Europe* 36, no. 1 (2012): 86.

¹⁴¹ Central Intelligence Agency, *Balkan Battlegrounds Volume 1*, 152-154, 186-187.

¹⁴² See *Galić* Trial Judgement, paragraphs 603-607.

¹⁴³ See *Galić* Trial Judgement, paragraphs 609-610.

Vojska ('HV') and was the Commander of the Split Military District.¹⁴⁴ It is not specified in the indictment or judgment what he was doing between his time in the French Foreign Legion (from 1 February 1973 to 1 February 1978) and returning to Croatia in June 1991.¹⁴⁵ Operation Storm was, on the whole, seen within and outside Croatia as a well organised military campaign to restore the control of the government of Croatia over its own territory.¹⁴⁶

These cases cover three different elements of the conflict and differing roles for attack and targeting within them. The judges considered a variety of scenarios of potential unlawful targeting within these cases with some overlap in the relevant legal principles (such as questions of the legal principle of proportionality in attack) and therefore some room for comparison between them and, in particular, between scenarios in the cases of *Galić* and *Gotovina*.

The cases selected here are not representative of the overall cases at the ICTY, in terms of the ethnic backgrounds of the defendants or of the charges brought. This is because of the emphasis of this study on breaches of IHL/LOAC in military attacks which was not in question in all cases before the ICTY.

Analysis of the decisions in these cases has been undertaken on the basis of detailed examination of the text of the judgments (including the references included in the footnotes) relevant to targeting law backed up by transcripts of witness testimony from the hearings. This encompasses consideration of the evidence and arguments presented to the judges. Given the volume of material available for each of the cases, the study has focused on the reasoning and evidence highlighted by the judges in their decisions. This means that the Prosecution and Defence cases have not been analysed in their entirety but simply where relied on or otherwise discussed by the judges.

In reviewing witness testimony in these three cases, two different approaches were adopted in establishing which witnesses on which to concentrate analysis due, in the main part to time limitations. The first approach was to read sequentially each prosecution witness who

¹⁴⁴ See *Gotovina* Trial Judgement, paragraph 96.

¹⁴⁵ See *Gotovina* Indictment as contained in the Corrected corrigendum to prosecutions notice of filing of amended joinder indictment of 12 March 2008, paragraphs 2-4.

¹⁴⁶ Central Intelligence Agency, *Balkan Battlegrounds Volume 1* (Washington: CIA, 2002), 367-377.

appeared before the judges, concentrating on the prosecution case (as opposed to the cross examination of the witnesses) unless they had given evidence that was particularly relevant to this study. This was adopted for the *Galić* case where it became evident that there was not sufficient time to read all testimony given in these three trials, particularly in any depth. The second approach was therefore to focus only on the witnesses specifically relied on in the judgement. This was adopted for the *Blaškić* and *Gotovina* cases – and was made easier for these cases by the fact that there was a list of witnesses for the *Blaškić* case and a fully organised witness table had been created by the time of the *Gotovina* case.

Use of NVivo and coding

The selected judgments (trial and appeal) and witness testimony have all been uploaded into NVivo for analysis. The witness testimony in each trial was heard over several years and even with selecting the testimony of witnesses likely to be relevant to the research questions/targeting matters the files uploaded into NVivo run to hundreds of thousands of words.

The judgments (as they relate to the law on targeting) and certain key testimonies have been manually coded in full. Given the scale of the data, the whole database has been subjected to key word searches for certain key terms. Some codes were established before coding commenced as relevant to answering the research questions, others have arisen on review of the documents. Two nodes of particular interest that were created during the course of coding the documents to address topics which were not foreseen were one that was needed to cover what seemed to be important non-technical witness evidence in relation to technical matters (such as the source of fire) and one for evidence that kept arising linking military commanders to the political background of the conflict.

As both Graham Gibbs and Douglas Ezzy point out, computer programmes such as NVivo can only ‘facilitate’, not carry out, analysis.¹⁴⁷ As well as being a means to record and easily access the manual coding of large amounts of data, the power of NVivo has also been used here to follow up on new themes/specific details and possible lines of enquiry raised through manual

¹⁴⁷ See, as a whole, Graham R. Gibbs, ‘Using Software in Qualitative Analysis’, in *The SAGE Handbook of Qualitative Data Analysis*, ed. Uwe Flick (London: SAGE Publications, 2013) and Douglas Ezzy, *Qualitative Analysis* (London: Routledge, 2002), 135.

coding by searching for particular words or phrases in the entirety of the data uploaded to NVivo. These search results form part of the detailed qualitative analysis by helping to give an idea of the scale of and patterns within the evidence, through and between the cases.

In coding the text in NVivo the following points were taken into account:

- What explicit rules and rulings have the judges provided?
- What is implicit in the judges' rulings?
- What words or phrases are repeated and what patterns of language use can be found. What is the significance or importance of these words/phrases to the judges – whether conscious or unconscious?
- Note irregularities/unusual occurrences and their treatment by the judges
- Any particular “concepts” arising (Bryman and Burgess refer to as ‘generation of concepts’ aspect of qualitative data analysis)? ‘Analytic categories ... grounded in the data and wider literature, categories which go beyond simple story-telling.’¹⁴⁸
- Using some ‘word counting’ to give an idea of scale and context of the qualitative work

NVivo has also been used to provide a means of categorising the sources of the results and using these categorisations for further analysis. As a result of preliminary findings demonstrating the range of witnesses proving valuable evidence in relation to the targeting charges, witness cases were created in NVivo and given attributes to demonstrate the range of witnesses who testified in relation to targeting matters. The testimony of these witnesses was coded to their specific case.

In total, 148 witness cases have been created from the testimonies of witnesses in the three cases. This includes victim witnesses, witnesses from various military organisations (both from within and outside the Former Yugoslavia) and expert witnesses. Each case has been provided with attributes to identify whether they were a soldier or civilian at the time of the incidents they described, whether if they were not a soldier at that time they had previous military experience, whether they were a national of the Former Yugoslavia or not and who they were giving evidence for, in which case and whether they were an expert witness. The cases were also set up to note if a witness was referred to by a judge in relation to one of three specific

¹⁴⁸ Christina Hughes, ‘Chapter 2: From field notes to dissertation: analyzing the stepfamily’, in *Analyzing Qualitative Data*, eds. Alan Bryman and Robert G. Burgess (Routledge: London, 2002), 45.

incidents in the case of *Galić* or in relation to the shelling of *Knin* in the case of *Gotovina*. This means that alongside individual coding of their testimony analysis can be run on the evidence provided by witnesses with particular characteristics. More detail of witnesses before the ICTY in general and in the selected cases in particular are set out in Chapter 4 (Evidence I: The Witnesses).

Contribution from Judge Ćinić

As the focus of this research moved towards practical questions of the assessment of witness testimony and other evidence by the judges, and therefore the role of the trial judges in particular, it was decided to investigate whether the trial judges from the case of *Gotovina* (being the most recent case, with all judges still traceable) would be willing to give their views on questions relevant to this study (albeit in a very general sense and not expecting disclosure of any sensitive matters). Judge Orić was approached but politely declined to assist due to the nature of the study. Judge Ćinić, now Associate Professor Dr. iur. Ćinić in the Faculty of Law at Rīga Stradiņš University, however, was particularly helpful. Although, having discussed my approach to him with Judge Orić, he did not think an interview was appropriate, he responded to those of a set of written questions (developed through an e-mail correspondence) that he felt that he was professionally able to answer. His answers are incorporated in Chapters 2 (The framework for the demarcation of the law of targeting at the ICTY) and 4 (Evidence I: The witnesses) of this thesis. Judge Gwaunza was approached by e-mail to see if she would answer a similar set of questions but although willing to help did not have the time to do so.

Some of the other judges who worked at the ICTY have written of their experience and views. This includes Judge Patricia Wald whose knowledge and thoughts have also been of great use to this study.

Assessing quality of research

In contrast to quantitative research studies, there are no long-established principles that form the basis for assessing the quality of qualitative research.¹⁴⁹ Schreier mentions 'consistency (to assess reliability) and validity' as quality criteria for qualitative content analysis. She states that although these criteria have been 'derived' from quantitative content analysis 'they are often applied less strictly.'¹⁵⁰

Carl Auerback and Louise Silverstein suggest that the qualitative concepts of *justifiability of interpretations* and *transferability of theoretical constructs* be used instead of the quantitative concepts of *reliability and validity* and *generalizability* respectively.¹⁵¹ They posit transparency, communicability, and coherence as criteria for distinguishing between justifiable and unjustifiable ways of using subjectivity to interpret data¹⁵² and use the term *transferable* to describe theoretical constructs that can be extended beyond a particular sample in place of the term *generalizable*.¹⁵³ Uwe Flick places particular emphasis on the 'transparency' of research and, in particular, how the research process as a whole must be made clear to its audience so that they are able to assess the quality of that particular research.¹⁵⁴

Paul Atkinson and Amanda Coffey explain that documents are 'social facts... produced, shared and used in socially organised ways' but also warn that they are not 'transparent representations of organisational routines, decision-making processes, or professional practices'.¹⁵⁵ This highlights that documents are important data for social research and have to be evaluated for implicit as well as explicit meaning.

¹⁴⁹ See, for example, Chapter 2 in Uwe Flick, *Managing Quality in Qualitative Research* (London: SAGE Publications, 2007); Jude Spiers et al., 'Reflection/Commentary on a Past Article: "Verification Strategies for Establishing Reliability and Validity in Qualitative Research"', *International Journal of Qualitative Methods* 17, no. 1 (2018) and David L. Altheide and John M. Johnson, 'Chapter 35: Reflections on Interpretive Adequacy in Qualitative Research', in *The SAGE Handbook of Qualitative Research*, 4th Edition, eds. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks, CA; London: SAGE, 2011).

¹⁵⁰ Schreier, 'Chapter 12: Qualitative Content Analysis', 173.

¹⁵¹ Carl F. Auerbach and Louise B. Silverstein, *Qualitative Data: An Introduction to Coding and Analysis* (New York and London: New York University Press, 2003), 78 onwards.

¹⁵² Auerbach and Silverstein, *Qualitative Data: An Introduction to Coding and Analysis*, 83-84.

¹⁵³ Auerbach and Silverstein, *Qualitative Data: An Introduction to Coding and Analysis*, 87.

¹⁵⁴ Chapter 10 in Flick, *Managing Quality in Qualitative Research*.

¹⁵⁵ Paul Atkinson and Amanda Coffey, 'Analysing Documentary Realities', in *Qualitative Research: Theory, Method and Practice*, Third Edition, ed. D. Silverman (London: SAGE, 2011), 79.

Without the time to carry out a detailed analysis of all possibly relevant material, this study has tried to be as thorough as possible within a limited selection of source material. The ICTY Court Records Database and NVivo were used to search for certain key terms to ensure that the most relevant witness transcripts and other material were selected and suitably investigated. Through reading and coding of these selected sources, the study has identified re-occurring concepts and confirmed certain themes. It endeavours to make a coherent case of its findings, as summarised in the thesis statement above, and not just provide extracts or examples in a vacuum. As Flick points out, a researcher must make sure they are analysing the material, not just providing 'illustrations'.¹⁵⁶

Summary of research method

It is clear that there was more happening in the cases under examination than the judges simply applying an existing set of rules to a clear set of facts. This study therefore uses the research method described here to investigate the central questions of this thesis, namely, what has influenced the judges in their demarcation of the line between lawful and unlawful conduct of targeting activities.

Ideas of qualitative analysis of documents in the broader social sciences have been instructive in the detailed analysis that has been conducted – highlighting the need to consider how the authors of the text seek to persuade their readers of the authority of their arguments and decisions, requiring an in depth analysis of how these arguments are formed (as well as what is left unsaid) and the assumptions within this.¹⁵⁷

This study has utilised the computer software NVivo to make manageable the large amounts of data that potentially contained material relevant to this study. It has enabled a systematic and relatively thorough approach through an ability to search the whole of the data for key words and terms.

¹⁵⁶ Uwe Flick, 'Mapping the Field', in *The SAGE Handbook of Qualitative Data Analysis*, ed. Uwe Flick (London: SAGE Publications, 2013), 4.

¹⁵⁷ Tim Rapley, *Doing Conversation, Discourse and Document Analysis* (London: SAGE Publications, 2007), 123.

In presenting the results of the research, the aim has been to attempt to demonstrate the main findings in a way that is true to the underlying judgments and testimonies. It has tried to adhere to 'transparency, communicability, and coherence' as posited as an indication of quality by Auerback and Silverstein.

Outline

The next chapter (Chapter 2 (The framework for the demarcation of the law of targeting at the ICTY)) introduces the framework within the law of targeting was applied at the ICTY. This includes the targeting related charges brought in each case, the relevant law of war crimes and criminal responsibility and the rules of procedure and evidence applied by the judges.

Chapter 3 (Law) sets out how the judges defined the crimes and established that certain crimes had been committed. It is here that consideration of whether the ICTY has had a role in the development of the law and, if so, what exactly this has been is carried out. It considers how the law was established and what factors were involved in this process. It does this through the application of the key IHL concepts of 'Distinction', 'Civilian' and 'Civilian Population'/'Military objectives' and 'Proportionality' in the cases of *Blaškić*, *Galić* and *Gotovina*. It is here that role of the rules in API and ICRC guidance, and through this, the principle of humanity, come to the fore.

Chapter 4 (Evidence I: The witnesses) introduces the witnesses who provided the testimony used as evidence in relation to the law of targeting. It is intended that this chapter should show something of the relationship between judges and the witnesses before them, that is the interrelationship between judging and testifying at the ICTY. This relationship is key to the findings that will be brought out in Chapters 5 (Evidence II) and 6 (Responsibility) as to the nature of the witness evidence that the judges relied on in reaching their judgments.

Chapter 5 (Evidence II: Finding criminal intent) sets out how the judges applied the law to the evidence before them. It considers how the judges utilised the military viewpoint as well as that of civilian (including victim) witnesses in assessing the legality of alleged unlawful attacks and uses the differences between the findings relating to the siege of Sarajevo and the re-

taking of Knin in Croatia to consider the implications for the factors relevant to the demarcation of the law in relation to charges of unlawful attack.

Chapter 6 (Responsibility) looks to the final stage of the demarcation of the law of targeting, namely the judicial attribution of individual criminal liability or innocence. It considers the role of command as well as the judges' treatment of the law of command responsibility as it relates to the law of targeting and individual criminal responsibility for matters of targeting. It is here that the lack of use of superior responsibility as a mode of liability becomes apparent. This chapter looks at the questions around the evidence of orders given (or not given) and the influences on the judges' decisions here, which included evidence relating to the agreement of the accused with alleged broader criminal projects underlying the conduct of the conflict.

Chapter 7 (Conclusion) sets out the conclusions of the study, describing how while looking for the influence of the concept of humanity and confirming its importance, particularly in the judges' relationships with the witnesses and demarcation of the law, it also found the influence of something that is described here as the 'military viewpoint'. The military viewpoint is not necessarily in clear distinction to the principle of humanity but seems to reflect a desire on the part of the judges to create a functioning legal framework that is recognisably sensible to military practitioners.

Introduction

In order to investigate what findings were made by the judges in relation to the law of targeting in the cases of *Galić*, *Blaškić* and *Gotovina* and whether any factors could be identified as influencing these decisions, it was necessary to establish the framework within which the judges were working. This framework was set within the war crimes jurisdiction of the ICTY pursuant to Article 3 of the ICTY statute. It was constructed from the relevant charges brought against the accused and substantive law (including that of criminal responsibility) applicable to these charges.

In the context of a trial, however, the applicable substantive law cannot by itself guide the conduct of the proceedings. The ICTY judges had to apply the law within the rules set out in the ICTY Statute and the rules of evidence and procedure drafted and adopted by the ICTY judges in their Rules of Procedure and Evidence ('RPE'). This framework was also therefore composed of the law of procedure and evidence which sets out what evidence could be provided to the judges and by what means.

This chapter starts by setting out the war crimes jurisdiction of the ICTY and the targeting related charges brought in each of the cases of *Blaškić*, *Galić* and *Gotovina*. It then provides an introduction to the relevant law of war crimes and criminal responsibility applied by the judges. It then introduces the rules of procedure and evidence under which the witnesses, whose experience of the conflict in the Former Yugoslavia forms the basis for much of this research, provided their testimony.

War crimes jurisdiction of the ICTY: Article 3 of the ICTY Statute

In his report that led to the establishment of the ICTY, the then Secretary-General of the United Nations, Boutros Boutros-Ghali, gave his view that in order to ensure the respect of the principle *nullem crimen sine lege* the judges should only apply rules that were 'beyond any

doubt' customary law at the time of the acts the accused were alleged to have committed. This would avoid the problem that not all states were parties to the relevant treaties/conventions.¹

In the Secretary-General's view, the part of conventional international humanitarian law which met these requirements was made up of:

- The Geneva Conventions of 12 August 1949 for the Protection of War Victims;
- The Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907;
- The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and
- The Charter of the International Military Tribunal of 8 August 1945 (the 'Nuremberg Charter' or 'London Charter').²

On this understanding, he recommended that grave breaches of the 1949 Geneva Conventions be included within the jurisdiction of the ICTY. He also recommended that there should be jurisdiction over certain elements of the Hague Regulations as well as the war crimes defined in Article 6(b) of the Nuremberg Charter, both as interpreted and applied by the Nuremberg IMT.³ The grave breaches were included in Article 2 of the ICTY Statute (Grave breaches of the Geneva Conventions of 1949) and the other war crimes considered to have customary status under Article 3 of the ICTY Statute (Violations of the laws or customs of war).

Article 3 of the ICTY Statute covering the 'Violations of the laws or customs of war' provided that:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

¹ Report of the Secretary-General at paragraph 34.

² Report of the Secretary-General at paragraph 35.

³ Report of the Secretary-General at paragraphs 37 – 44.

This list by the Secretary-General of the components of customary international humanitarian law of war crimes gave no indication of a rule prohibiting attacks on civilians as such during the conduct of hostilities. It did not mention any of the provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 ('API').

The list of war crimes under the jurisdiction of the ICTY was, however, non-exhaustive (stating 'violations shall include, but not be limited to' those explicitly set out) and was utilised as such by the OTP.⁴ For the purposes of this research, it is the use by the OTP of this open ended provision to bring charges of 'unlawful attacks on civilians' that is most relevant and which is now considered in the context of each of the cases. It should be noted that this study does not consider the law as it relates to internal armed conflicts.

In addition to the provisions regarding Grave breaches of the Geneva Conventions of 1949 (Article 2 ICTY Statute) and Violations of the laws or customs of war (Article 3 ICTY Statute), the ICTY was also given jurisdiction over crimes of Genocide (Article 4 ICTY Statute) and Crimes against humanity (Article 5 ICTY Statute). The provisions of the ICTY Statute regarding crimes against humanity are relevant to this study because of Article 5(h). This provides that the ICTY has the jurisdiction to prosecute those persons responsible for 'persecutions on political, racial and religious grounds'. As will be discussed below, this became another means by which the legality of the conduct of attacks carried out by armed forces could be considered by the judges of the ICTY.

Article 7 of the ICTY Statute sets out the rules governing individual criminal responsibility relevant to all of the substantive crimes covered by Articles 2 to 5. It provided for direct responsibility, including via modes of liability for acts less than commission such as 'ordering' and 'aiding and abetting', in Article 7(1)) as well as indirect responsibility through superior or command responsibility in Article 7(3). Questions regarding individual criminal responsibility of

⁴ The conditions for the identification of other war crimes falling within the jurisdiction of the ICTY were set out in *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, '*Tadić* Jurisdiction Appeal Decision', paras. 94, 143. In the *Galić* Appeal Judgement the judges confirmed the *Tadić* finding that treaty based/conventional law could form the basis for their jurisdiction provided it met the conditions set out in paragraph 143 of the *Tadić* Jurisdiction Appeal Decision. They went on to state that ICTY practice was, however, to establish that any such treaty provision was also 'declaratory of custom'. *Galić* Appeal Judgement at paragraph 85.

commanders are addressed in Chapter 6 (Responsibility) but they are also relevant to the charges brought in the cases discussed in the next section.

The charges brought in the cases

This section sets out the charges brought against the accused in the three cases under discussion that were most relevant to questions of targeting. It shows how the OTP introduced charges of ‘unlawful attack’ and how the offence was developed. It also includes a description of how unlawful attacks were incorporated as an element of persecution as a crime against humanity by the judges in *Blaškić* and then charged by the OTP as such in *Gotovina*.

General Tihomir Blaškić was charged on the basis of individual and superior responsibility pursuant to Articles 7(1) and 7(3) with twenty counts made up of charges of crimes against humanity, grave breaches and violations of the laws and customs of war for his alleged role in the crimes committed against Bosnian Muslims by members of the armed forces of the HVO in the Lašva Valley region of central Bosnia.⁵ These were broken down under the headings Persecution (Count 1), Unlawful Attacks on Civilians and Civilian Objects (Counts 2-4),⁶ Wilful Killing and Causing Serious Injury (Counts 5-10), Destruction and Plunder of Property (Counts 11-13), Destruction of Institutions Dedicated to Religion or Education (Count 14), Inhumane Treatment, the Taking of Hostages and the Use of Human Shields (Counts 15-20).

Blaškić was charged with responsibility for attacks against the villages of through two different means:

Count 2: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, as recognised by Articles 3 (b), 7(1) and 7(3) of the Statute of the Tribunal (devastation not justified by military necessity).

and

Count 3: an unenumerated VIOLATION OF THE LAWS OR CUSTOMS OF WAR, as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal and customary

⁵ *Blaškić* Second Amended Indictment of 25 April 1997.

⁶ The Prosecutor withdrew count 2 of the indictment which had charged devastation not justified by military necessity as a violation of the laws or customs of war pursuant to Article 3(b) of the Statute. See *Blaškić* Trial Judgement, paragraph 6 referring to Summary of the Prosecutor’s Final Brief, 22 July 1999 (filed on 30 July 1999) paragraph 8.2, p. 59.

law, Article 51 (2) of Additional Protocol I and Article 13(2) of Additional Protocol II (unlawful attack on civilians).

It is the charge contained in Count 3 that is of specific interest to this study with its reference to 'unlawful attack on civilians'.

Blaškić was initially found guilty on all counts except for those relating to the shelling of Zenica (Count 2 having been withdrawn by the Prosecutor). He was found guilty by the Trial Chamber of having ordered a crime against humanity in the form of persecutions against the Muslim civilians of Bosnia, including through attacks on towns and villages, and was found guilty of having ordered unlawful attacks on civilians.

The Appeals Chamber reversed all the findings of the Trial Chamber except for some of those relating to the treatment of detainees. All findings of guilt related to unlawful attacks against civilians were reversed.

Major-General Stanislav Galić was charged (on the basis of individual and superior responsibility pursuant to Articles 7(1) and 7(3)) with offences under three main headings, namely 'Infliction of Terror', 'Sniping' and 'Shelling' for his role in what became known as the siege of Sarajevo.⁷ Under the heading 'Infliction of Terror', the prosecution charged Galić with 'Violations of the Laws or Customs of War (unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) punishable under Article 3 of the Statute of the Tribunal' (Count 1). Under the heading 'Sniping' the prosecution charged Galić with two counts of Crimes Against Humanity (murder and inhumane acts other than murder, punishable under Article 5(a) and Article 5(i) of the Statute of the Tribunal respectively) and one count of Violations of the Laws or Customs of War (attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949, punishable under Article 3 of the Statute of the Tribunal) (Counts 2-4). Under the 'Shelling' heading, the prosecution charged the same two counts of Crimes Against Humanity and the same count of Violations of the Laws or Customs of War (Counts 5-7).

⁷ Galić Indictment of 26 March 1999. Central Intelligence Agency, *Balkan Battlegrounds Volume 1*, 152-154, 186-187.

Galić was found guilty at trial pursuant to Article 7(1) on counts 1, 2, 3, 5 and 6 with the effect that the charges of attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949 in counts 4 and 7 were dismissed. These convictions were all upheld on appeal. The charges of unlawful attack against Galić were similar to those used in *Blaškić* but did not refer to customary law.

General Ante Gotovina was charged pursuant to Article 7(1) on the basis of his individual responsibility as well as through participation in a joint criminal enterprise and under Article 7(3) with committing nine counts of crimes against humanity and violations of the laws or customs of war for his part in Operation Storm in Croatia. These charges were broken down under the headings Persecutions (Count 1) (the key element of which was the charge that Gotovina had carried out unlawful attacks),⁸ Deportation and Forcible Transfer (Counts 2 and 3), Plunder of Public or Private Property (Count 4), Wanton Destruction (Count 5), Murder (Counts 6 and 7) and Inhumane Acts and Cruel Treatment (Counts 8 and 9).⁹

Mladen Markač's case was joined to that of Gotovina and he was tried alongside Gotovina for his role in Operation Storm. The prosecution described Markač as being the Assistant Minister of the Interior and Commander of the Special Police of the Ministry of the Interior of the Republic of Croatia at the time of Operation Storm. As such, it was alleged that he '...participated in various structures of power and responsibility and possessed effective control over all members of the Special Police who were involved in Operation Storm....[and] possessed effective control over all members of the HV rocket and artillery units attached to his forces or subordinated to his command during Operation Storm and the continuing related operations and/or actions'.¹⁰ The joinder indictment charged Markač with the same nine counts through the same means of responsibility as it did Gotovina.

Gotovina and Markač were both found guilty at trial of all counts against them except for count 3 on the basis of their participation in a joint criminal enterprise. Both were subsequently fully acquitted by the Appeals Chamber.

⁸ See conclusions in relation to Knin in Gotovina Trial Judgement, paragraphs 1912-1913.

⁹ *Gotovina* Indictment as contained in the Corrected corrigendum to prosecutions notice of filing of amended joinder indictment of 12 March 2008.

¹⁰ See *Gotovina* Indictment as contained in the Corrected corrigendum to prosecutions notice of filing of amended joinder indictment of 12 March 2008, paragraphs 10 and 11.

One key point to note from the indictments considered here is that as well as 'unlawful attack' charges being brought pursuant to Article 3 of the ICTY Statute (Violations of the laws or customs of war) they were also, in the case of *Blaškić*, incorporated as an element of a charge of persecution pursuant to Article 5 of the ICTY Statute (Crimes Against Humanity) and, in the case of *Gotovina*, exclusively brought under Article 5 persecution charges.

In the *Blaškić* indictment the prosecution alleged under Count 1 (Persecution) that the 'persecution was perpetrated through' acts including:

Attacks on Cities, Towns and Villages:

6.1. The widespread and systematic attack of cities, towns and villages, inhabited by Bosnian Muslims, in the municipalities of Vitez, Busovaca, Kiseljak, and Zenica.¹¹

As the Appeal Chamber pointed out, however, the Trial Chamber in *Blaškić* made no explicit finding that attacks may constitute an act of persecution, the first reference to this being found to be the case being in the Disposition where it found *Blaškić* guilty 'of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia... for the following acts: - attacks on towns and villages....'.¹²

In deciding that attacks can be an act of persecution (specifically, the Appeals Chamber held that 'attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages, may constitute persecutions as a crime against humanity')¹³ and in defining these attacks, the Appeals Chamber looks straight to the Additional Protocols and the Fourth Hague Convention of 1907 and the customary status of the relevant laws of war, with no mention of any crime against humanity specific definition.¹⁴ At footnote 330 the *Blaškić* Appeal judges appear to give a further reference for this, however, it in fact leads to authority that appears to be for the following paragraph stating that such crimes have to be of the same severity or gravity as the elements listed in Article 5 itself.¹⁵

There is even less consideration in the *Blaškić* case of the definition of an 'unlawful attack' as a war crime. The Trial Chamber in *Blaškić* provide no reference for their definition of an 'unlawful attack against civilians' as charged pursuant to Article 3 except for 'As proposed by

¹¹ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Second Amended Indictment of 25 April 1997.

¹² *Blaškić* Appeal Judgement, paragraph 156.

¹³ *Blaškić* Appeal Judgement, paragraph 159.

¹⁴ *Blaškić* Appeal Judgement, paragraphs 156-159.

¹⁵ *Blaškić* Appeal Judgement, footnote 330.

the Prosecution...' with a footnote reference to the Prosecutor's Summary which is not publicly available.¹⁶ The Appeals Chamber made no separate legal statements about the charges brought under Article 3 and overturned the convictions based on Article 3 having found that Blaškić had no criminal responsibility for the attacks.¹⁷ Despite this lack of consideration, there was no question that the crime of unlawfully attacking civilians was found to be within the jurisdiction of the ICTY.

In the *Blaškić* Trial Judgement no distinction is made as to whether the facts fit one or both of the types of charges. The judges seem to intermingle discussions of both and in fact find that certain of the attacks that occurred formed part of a persecution as well as being unlawful pursuant to Article 3. This may well be because the approach taken by the Prosecutor's office (as we can infer from Fenrick's article 'The prosecution of unlawful attack cases before the ICTY')¹⁸ was that to be an attack that would qualify as a crime against humanity of persecution (which requires an attack against a civilian population to have occurred as an overarching precondition) it first would have to be unlawful pursuant to the laws of war. This is not enunciated as such by the trial chamber and it may well be that the detail is given in the Prosecutor's Summary, referred to in their footnotes. Unfortunately this remains confidential.

The *Gotovina* Trial Judges stated that

An attack on civilians or civilian objects in the context of crimes against humanity is to be understood as acts of violence deliberately launched against civilians or civilian objects, although with no requirement of a particular result caused by the attack, as well as indiscriminate attacks on cities, towns, and villages.

An attack on civilians and civilian objects, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.¹⁹

The main difference between these two forms of charging unlawful attack in the conduct of hostilities for the purposes of the *Gotovina* case arises from the appeal judgement in the case of *Kordić and Čerkez*. Here the Appeals Chamber held (in December 2004) that there was no

¹⁶ *Blaškić* Trial Judgement, footnote 341.

¹⁷ *Blaškić* Appeal Judgement at Parts VII – X.

¹⁸ William J. Fenrick, 'The Prosecution of Unlawful Attack Cases before the ICTY', *Yearbook of International Humanitarian Law* 7 (2004), 157.

¹⁹ *Gotovina* Trial Judgement at paragraphs 1831-1842 citing at footnote 929, *Blaškić* Appeal Judgement, paragraph 159; *Kordić and Čerkez* Appeal Judgement, paragraphs 47, 57, 105 and at footnote 930 *Blaškić* Appeal Judgement, paragraph 159; *Kordić and Čerkez* Appeal Judgement, paragraphs 104, 672-673.

requirement for proof of death or injury in the case of attacks as a form of persecution. This has not gone without criticism externally but remained the ICTY position.²⁰

The *Gotovina* indictment did not initially mention unlawful attack and did not through several iterations until an amended joinder indictment of 17 May 2007 when it was included as one of the forms of persecution alleged under Count 1. In Count 1 of the final *Gotovina* indictment the prosecution charged persecution through ‘other inhumane acts, including the shelling of civilians’ as well as through unlawful attacks as such. The judges, however, preferred to consider the charges relating to the shelling of civilians as unlawful attacks against civilians as the crime against humanity of persecution and not as inhumane acts and cruel treatment.²¹ The indictment also separately charged inhumane acts (as a crime against humanity in Count 8) and cruel treatment (as a violation of the laws or customs of war in Count 9) including through ‘firing upon (including by aerial attack)’ civilians and those taking no part in hostilities but the judges did not make any findings as to the use of artillery under this heading.

The next section of this chapter provides a background to the substantive law applicable to the charges of unlawful attack (whether charged under Article 3 or 5 of the ICTY Statute) brought at the ICTY. It sets out the law as it was at the time that the ICTY judges began their work in order that later chapters can demonstrate how the judges worked with the law they were presented with.

Introduction to customary and conventional law relevant to targeting charges

As was mentioned in Chapter 1 (Introduction) the ICTY Statute and Rules of Procedure and Evidence contained no rules as to the relevant sources of law that could be used by the judges in reaching their decisions, although the Secretary-General intended that rules that were beyond doubt part of customary international law would be applied. This meant that the judges had to adopt their own approaches to establishing the existence or otherwise – and detailed content – of customary law as well as the place of treaty law and rules of national jurisdictions.

²⁰ William J. Fenrick, ‘Gold or Double Standard’, Unpublished Article: 8.

²¹ *Gotovina* Trial Judgement, paragraph 1856.

In discussing the role of IHL treaties, the *Galić* Appeal Judges set out that

in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements...²²

The *Galić* Appeal Judges were pointing out the fact that international treaties, even those such as the Geneva Conventions of 1949, were not designed as criminal codes and did not contain all the details necessary to establish what was required to find an individual criminally responsible for particular conduct. This, taken together with the guidance of the Secretary-General, meant that the judges looked to customary international law to fill the gaps.

As also mentioned in the introduction, however, the particular contents of customary law at any particular moment is hard to ascertain due to its evolutionary nature and basis on the actions and motivations of states. To some extent the difficulty to set out the specific contents of customary international law in this field is also because the development of customary law cannot be disentangled from the treaty development through the 20th Century, one building on the other over this time.

The judges in the early cases at the ICTY had very little in terms of customary international law precedent and discussion regarding any of the crimes set out by the Secretary General and even less specifically relating to the law of targeting. The major study of the ICRC into customary international humanitarian law commenced in 1996 and was published in 2005, too late to guide the establishment of the applicable law by the judges in the early cases before the ICTY.²³

The main judicial precedent for the ICTY, the Trial of the Major War Criminals before the International Military Tribunal in Nuremberg ('Nuremberg IMT'), was of limited use in providing detail of the laws the ICTY was to apply.²⁴ Kevin Jon Heller states that the Nuremberg

²² *Galić* Appeal Judgement, paragraph 83.

²³ <https://www.icrc.org/en/document/customary-international-humanitarian-law-0> (last accessed 13.05.2019); Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law* (Geneva; Cambridge: International Committee of the Red Cross and Cambridge University Press, 2005), 2 Volumes.

²⁴ The International Military Tribunal for the Far East is rarely mentioned in this context, perhaps because it is less well known, has been seen to be secondary to the Nuremberg IMT or because of its mainly negative reputation (whether deserved or undeserved). See Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal - A Reappraisal* (Oxford: Oxford University Press, 2008), 1-5.

IMT judgment contained ‘remarkably little criminal law’ and says its ‘discussion of the crimes themselves is relatively cursory and unsystematic’.²⁵ Heller sets out how the twelve subsequent trials brought by the United States and conducted before military tribunals in Nuremberg pursuant to Control Council Law No. 10 (the ‘subsequent Nuremberg trials’) considered the law in much more detail although even then he describes the approach in these judgments to have varied from ‘misguided’ to, more often, ‘very progressive’ leaving elements of contradiction within their legacy.²⁶

In 1996, the International Court of Justice (‘ICJ’) opined that the ‘cardinal’ principles of humanitarian law contained in the relevant treaties were; firstly, the principle that distinction must be made between combatants and non-combatants and that therefore states ‘must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets’ and secondly, the principle that ‘it is prohibited to cause unnecessary suffering to combatants’ so that ‘States do not have unlimited freedom of choice of means in the weapons they use’.²⁷ They also confirmed that ‘these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’.²⁸

The ICJ judges in fact cite the Report of the Secretary General where he sets out what he considers the ‘part of conventional international humanitarian law which has beyond doubt become part of international customary law’.²⁹ In relation to API, the ICJ opinion states ‘Additional Protocol 1 in no way replaced the general customary rules applicable to all means and methods of combat’.³⁰

In the Nuclear Weapons Case, the ICJ was not giving an opinion on international criminal law, but on the law applicable to states. This was, however, a rare occasion on which judges were asked to consider the contents of IHL and the extremes of its application. Questions more directly relevant to targeting in conventional warfare had been raised in the decades leading

²⁵ Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2012), 3.

²⁶ Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, 3, 5.

²⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226 (‘Nuclear Weapons Advisory Opinion’), Paragraph 78.

²⁸ Nuclear Weapons Advisory Opinion, Paragraph 79.

²⁹ Nuclear Weapons Advisory Opinion, Paragraph 81.

³⁰ Nuclear Weapons Advisory Opinion, Paragraph 84.

up to the establishment of the ICTY, in particular by the 1980-1988 Iran/Iraq war and the first Gulf War, but there was no judicial forum to establish authoritative answers.³¹

Within the treaties developed to set the limits of warfare between states, civilians were not a main concern until Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949. The Hague field of rules (such as the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land) hardly touched on civilians.³² The Additional Protocols are special in this regard in that they are a mixture of Hague and Geneva traditions and specifically link the protection of civilians and the very manner in which hostilities are conducted.³³

As set out earlier in this chapter, the OTP selected Article 51(2) of API (and, in the case of *Blaškić*, also specifically citing its customary law equivalent) as the most relevant to bring a charge of intentionally attacking/targeting civilians. Through this selection and the judges' acceptance of it, Article 51 API became central to the work of the ICTY in its handling of the law relating to targeting. This is despite the fact that it was not mentioned in the Report of the Secretary General or the ICTY Statute and that the provisions of Article 51, and in particular for the purposes of this study, the definition of 'military advantage' and 'military objective', were not even accepted by all states parties to API without reservation.³⁴

Article 51 API forms part of the section of API entitled 'Part IV: Civilian population - Section I -- General protection against effects of hostilities'. Article 51(2) API states the fundamental rule that 'The civilian population as such, as well as individual civilians, shall not be the object of attack'.

³¹ See, for example, Ige F. Dekker and Harry H. G. Post, eds., *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* (Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1992), Christopher Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict', in *The Gulf War 1990/91 in International and English law*, ed. Peter Rowe (Abingdon: Routledge 1993) and Judith G. Gardam *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Leiden, The Netherlands: Brill | Nijhoff, 1993).

³² See Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2000), 67 (for the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land) and 59-153 (regarding the Hague body of law more generally).

³³ Nuclear Weapons Advisory Opinion, Paragraph 75, Roberts and Guelff, *Documents on the Laws of War*, 420.

³⁴ See Julie Gaudreau, 'The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims', *International Review of the Red Cross* 849 (March 2003): 143-184.

Article 51 API contains other important principles. These are the prohibition of indiscriminate attacks contained in Article 51(4) and the provision in Article 51(5)(b) that ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ is to be considered indiscriminate (and therefore prohibited). This provision in Article 51(5)(b) is seen as one expression of the principle of ‘proportionality’ and is repeated in Article 57(2). The key words here are ‘anticipated’, ‘excessive’ and ‘concrete and direct military advantage’. Their interpretation is key to the level of protection given to civilian populations. Schmitt highlights that the relevant ‘standard is “excessive” (a comparative concept), not “extensive” (an absolute concept)’.³⁵

The ICRC notes in its commentary to API that paragraphs 4 and 5 of Article 51 API in particular were criticised at the Diplomatic Conference for their ‘imprecise wording and terminology’ and accepts that such criticisms are to a certain extent justified.³⁶ It particularly notes that

Putting these provisions into practice, or, for that matter, any others in Part IV, will require complete good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population.³⁷

From the perspective of those applying the law in the 1990s to present, it can be seen clearly that the provisions of API regarding the protection of civilians from direct and indirect attacks represented a crystallisation of a change in the law since the Second World War (or at least a settling of a dispute over its contents) and that this is a reason for a lack of case law and customary law regarding the targeting of civilians in an attack up to this point.³⁸ Fenrick goes further and says that there was really no applicable case law for the ICTY to apply in relation to the targeting charges given that the WWII cases were about those in occupied territory or

³⁵ Michael N. Schmitt, ‘Precision Attack and International Humanitarian Law’, *International Review of the Red Cross* 87, no. 859 (2005): 457.

³⁶ Paragraphs 1977 - 1978.

³⁷ Paragraph 1978.

³⁸ The examples Heller gives of misguided decisions by the Nuremberg Military Tribunals includes some that were particularly of their time and probably not that controversial to the Allies given what they had judged acceptable in their own bombing campaigns; the *Einsatzgruppen* tribunal concluded that international law permitted the morale bombings of civilians, even with atomic weapons, and the *Hostage* tribunal held that it was permissible in certain situations to execute innocent civilians in reprisal. Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2012), 3, 310

under control of the occupying forces.³⁹ The *Blaškić* Trial Judges really did have something of a blank canvas to start from when asked to hear evidence and then judge on unlawful attack charges; the *Galić* Trial Judges had only a very little more guidance.

The charge against Blaškić⁴⁰ for unlawful attack against civilians mentions both customary law and API/APII which were, and are now even more, difficult to separate from each other in substance as they relate to attacks on civilians. The API/APII provisions relating to the protection of civilians are treaty law but are in part considered declaratory of customary law. Schmitt puts it that the 'contemporary form' of the customary international law principle of distinction has been 'codified' in Article 48 of API with Articles 51(2) and 52(1) providing 'granularity to the general principle', prohibiting attacks on civilians and civilian objects respectively.⁴¹ Customary law could in turn be seen to have built on the existence of these provisions of API/APII.

It is clear from the rules set out in Article 51 API and the customary international law that surrounds them, that the concepts of distinction, civilian/civilian population and military objectives and proportionality are key to the rules governing attacks. The next chapter (Chapter 3 (Law)) is a detailed consideration of how the judges at the ICTY approached the definition of these concepts and then applied them.

The ICTY was a criminal court and therefore establishing the contents of the law of targeting was not the end of their work. The judges also had to establish where individual criminal responsibility would be incurred for its breach. The next section of this chapter sets out a brief introduction to the concept of individual criminal responsibility for breaches of certain provisions of the law of armed conflict.

³⁹ William J. Fenrick, 'Commentary: A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor V. Tihomir Blaškić,' *Leiden Journal of International Law* 13, no. 04 (2000): 931.

⁴⁰ The *Galić* indictment only mentions API/APII, not customary law.

⁴¹ Michael N. Schmitt, 'Fault Lines in the Law of Attack', in *Testing the Boundaries of International Humanitarian Law*, eds. Susan Breau and Agnieszka Jachec-Neale (London: British Institute of International and Comparative Law, 2006), 279.

Criminal responsibility for breaches of the law

The criminal prosecution of individuals for the commission of war crimes was not an initial priority of the international law governing armed conflict developed around the turn of the 19th into the 20th century. Article 3 of Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, for example, provided for a regime of compensation between states for the acts of individuals within their armed forces:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁴²

The Nuremberg and Tokyo IMTs and the subsequent Nuremberg trials were an important step in confirming that individuals could be held criminally responsible under international law.⁴³ The Geneva Conventions of 1949 took a separate step towards providing for the liability of individuals, requiring the contracting states to impose a regime of criminal liability for the breach of certain of their provisions, described as 'Grave Breaches'.⁴⁴

⁴² NB Article 91 of API (Responsibility) also provides that 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

⁴³ Christian Tomuschat, 'The Legacy of Nuremberg', *Journal of International Criminal Justice* 4, no. 4 (September 2006): 837-838, Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2012).

⁴⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, for example, provided that:

Art. 146. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

...

Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive

API continued and supplemented the Grave Breaches regime of the 1949 Geneva Conventions with its own criminal regime set out in Article 85 API (Repression of breaches of this Protocol). Most relevant to this study, it included certain breaches of its rules protecting civilians as grave breaches (and war crimes), 'when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health'. It specifically made war crimes of:

- (a) making the civilian population or individual civilians the object of attack; and
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii).⁴⁵

Despite these developments, the lack of any international prosecutions after those arising from the Second World War meant that the international law of individual criminal responsibility was not developed further. In addition, although it may be a deeply rooted concept,⁴⁶ 'command responsibility' or 'superior responsibility' (terms used interchangeably in this study), the criminal legal responsibility of commanders for the actions of their subordinates, was not clearly defined in international law ready for the ICTY simply to apply. There was very little case law, and even the well known cases arising from the prosecution of conduct in the Second World War were not necessarily clear on what exactly command responsibility entailed and how far it could reach. The exact meaning of the result in *United States v. Yamashita*, for example, was only the start of a discussion as to what was required to find commanders liable through their omissions. This case did not provide much guidance on the level of control a superior must possess over the actions of their subordinates for command responsibility to apply. It also left the question of what mental standard had been applied to find General Yamashita guilty (strict liability, an inference of actual knowledge from the circumstantial evidence or a 'should have known' standard) open to debate.⁴⁷

destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

⁴⁵ API Article 85(3) and 85(5).

⁴⁶ See, for example, Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2008), 145-148.

⁴⁷ Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*, 153, 159-161.

API provides for potential 'penal or disciplinary' responsibility of commanders for the acts of their subordinates under the heading 'Failure to Act'.⁴⁸ In addition, it sets out the duties of commanders to 'prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol'.⁴⁹ This was again a regime directed at states whose role it was to ensure compliance.

The Report of the Secretary General does not include any discussion of what the contents of the rule of superior responsibility are and how these should be included in the ICTY Statute. It is possible the Secretary General was referring to Nuremberg case law in this regard, however, this is not entirely clear from the manner in which the relevant paragraphs are constructed.⁵⁰ The Secretary General included the principle of superior responsibility in the statute in the terms set out in Article 7(3):

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Although the Secretary General does not mention the provisions of API, Article 7(3) does not seem completely dissimilar to the combined requirements of Article 86(2) and Article 87(3). This combination, as Darryl Robinson points out, ignores the difference between the two articles reflecting the different roles of humanitarian law procedural duty and criminal responsibility; the effect of this is to remove a causal requirement for criminal responsibility in the case of findings of responsibility for failure to punish.⁵¹

Given the lack of a detailed criminal code or international precedent, the contents and scope of the law of the criminal responsibility of those in command, as for other areas in the ICTY Statute, had to be 'found' in customary international law by the judges. The approaches of the judges to the identification of criminal responsibility in the cases of *Blaškić*, *Galić* and *Gotovina* are set out in detail in Chapter 6 (Responsibility). This includes looking in some detail at what constitutes criminal intention on the part of commanders and the role of criminal liability pursuant to the Article 7(1) mode of ordering. In considering the factors that might have had

⁴⁸ API Article 86.

⁴⁹ API Article 87(1).

⁵⁰ Report of the Secretary General at paragraphs 55-56.

⁵¹ See Darryl Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law* 21, no. 4 (2008): 953-954.

an influence on the judges' decisions as to criminal responsibility (or innocence), Chapter 6 includes a description of the role in the judges' determinations of a particular commander's alignment with the broader political ambitions of their side to the conflict.

The next section of this chapter introduces another fundamental part of the framework within which the judges at the ICTY were working, the rules of procedure and evidence. Although they may seem far removed from the law of targeting, these governed what and how evidence was presented to the judges. This in turn dictated what information the judges had before them when they had to make their decisions as to whether there had been criminal breaches of the law of targeting.

Rules of procedure and evidence at the ICTY

Although there were the precedents of the IMTs and subsequent proceedings of the Nuremberg Military Tribunals (which were applying international law, although not international tribunals themselves),⁵² at the time of the hearing of the cases of *Blaškić* and *Galić* there could not be said to be such a thing as 'international criminal procedure'. Kevin Jon Heller points out that the IMT Judgment contained 'nothing on evidence and procedure; almost nothing on modes of participation, defenses, or sentencing' and although the subsequent proceedings of the Nuremberg Military Tribunals did, however, cover these areas in more detail they were not always consistent precedents.⁵³

As mentioned in Chapter 1 (Introduction), the first judges appointed to the ICTY had to draw up and adopt their own rules of procedure and evidence ('RPE').⁵⁴ The judges who drafted these rules, who included in their number Antonio Cassese, one of the foremost international legal scholars at the time,⁵⁵ gave themselves and the other ICTY judges broad powers regarding the treatment of evidence. Rule 89 of the RPE provided that

⁵² See Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2012), Chapter 5.

⁵³ Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, 3.

⁵⁴ See paragraph 83, Report of the Secretary General.

⁵⁵ Guido Acquaviva, 'A Conversation with Antonio Cassese', *Leiden Journal of International Law* 25, no. 3 (2012): 824.

....

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

....

The broad powers under RPE 89(C) extended to the admission of hearsay and circumstantial evidence.⁵⁶ Provided with permissive rules of evidence, the judges at the ICTY had, as in many other areas, to tread a new path in deciding the limits of documentary and witness testimony to be admitted. The standard to which the OTP had to prove their case was, however, well known; the standard of proof of guilt ‘beyond reasonable doubt’. Rule 87(A) RPE declared

A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

Marieke Wierda starts her article on international criminal evidence with the observation that the ‘evidentiary challenges faced by international criminal courts do not resemble those faced by ordinary criminal courts’.⁵⁷ On the face of it this is clearly correct. Wierda refers in particular to the scarcity of evidence as to individual guilt alongside huge volumes of other evidence because of the massive scale of the crimes. To this, and specifically relevant to this research, could be added having to find and assess evidence of certain actions of armed forces in fighting their wars.

It could also be said, however, that certain evidentiary challenges are exactly the same as those faced by criminal courts in national jurisdictions. Matters such as assessing the credibility of witnesses, the value of documentary evidence and the criminal intent of the accused are every day work for these courts.

⁵⁶ For hearsay, see, for example, Appeals Chamber Decision on Prosecutor’s Appeal on Admissibility of Evidence of 16 February 1999 in *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, paragraph 15.

For the treatment of circumstantial evidence see, for example, Appeal Judgement of 23 October 2001 in *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, paragraph 303.

⁵⁷ Marieke Wierda, ‘International Criminal Evidence: New Directions’, *Law and Practice of International Courts and Tribunals* 2, no. 3 (2003), 401.

When asked 'What did you find to be the biggest difference between working as a judge for the ICTY and working in your own jurisdiction?', Professor Ķinis answered that it was the legal framework (Statute and Rules of Procedure and Evidence) and the scale of the crimes. He also replied that in Latvia they do not have cross-examination. He specifically pointed out, however, that both Latvian national and ICTY proceedings were based on the same principles of 'legality, equality of parties, an efficiency of justice and human rights' and went on to say

Irrespective of differences between both legal systems, elements of the crime (*corpus delicti*) is the same - *actus reus* and *mens rea*. I am a judge. The main task for every judge is to adjudicate a case, verify and weigh evidence, and establish the truth and to make a judgment.

In addition to confirming that he considered the assessment of evidence to be a constant of the judges' role in both national and international settings, it is interesting that Professor Ķinis linked the rules of procedure and evidence governing a trial to the fundamental principles underlying a criminal justice system. Discussion of and compliance with the procedural and evidential rules may not usually be the exciting part of a trial but they are important to make sure the trial meets the standards required by the fundamental principles each legal system has decided are necessary for criminal justice to be done, such as those Professor Ķinis lists as applying in Latvia and at the ICTY.

Peter Murphy, a former trial and appellate defence counsel at the ICTY and a Circuit Judge on the South Eastern Circuit (England and Wales) at the time of writing his article, points out the dangers of the system adopted by the ICTY. He is of the view that given the ICTY has adopted a basically adversarial approach, it should have taken more notice of the common law rules of evidence developed from the experience that 'the judicious use of rules of evidence, to keep the proceedings within reasonable bounds and to prevent abuses by the parties, creates the most favourable environment for a correct adjudication to emerge'.⁵⁸ He warns that it is not possible for even the best of judges to avoid the risk of the trial becoming contaminated by evidence that should not have been admitted; leaving the question of the probity of the evidence to a later point means potentially false or misleading evidence being built around and upon, making it difficult to extricate from the final picture.⁵⁹

⁵⁸ Peter Murphy, 'No Free Lunch, no Free Proof', *Journal of International Criminal Justice* 8, no. 2 (2010), 551.

⁵⁹ Peter Murphy, 'No Free Lunch, no Free Proof', 552.

Murphy's view highlights the heavy responsibility placed upon the judges of the ICTY by the RPE to assess a huge amount of evidence of varying quality. How the judges assessed the evidence presented in relation to targeting charges and a consideration of what factors influenced these decisions forms the basis of Chapter 5 (Evidence II: Finding criminal intent).

Conclusion

This chapter has introduced the framework within which the judges carried out the demarcation of the law of targeting at the ICTY; that is, the war crimes jurisdiction of the ICTY and relevant charges brought in each of the cases of *Blaškić*, *Galić* and *Gotovina*, the substantive law of targeting and criminal responsibility and the basic rules of procedure and evidence applicable at the ICTY.

The charges that are most relevant to this study of the law of targeting are those charging the accused with having carried out an unlawful attack against civilians, whether pursuant to Article 3 (War Crimes) or Article 5 (Crimes against Humanity). As framed by the OTP, this charge brought Article 51 (2) of Additional Protocol I ('The civilian population as such, as well as individual civilians, shall not be the object of attack.') as well as customary law regarding the protection of civilians to the consideration of the judges.

The international law relating to the protection of civilians at the time of the establishment of the ICTY was perhaps best described as inchoate. Additional Protocol I had been adopted but not by all states. Some of its provisions were accepted as reflective of customary international law but there had been no international judicial determination on what these provisions or customary law meant in practice. The judges at the ICTY were not given explicit jurisdiction over crimes of attacking civilians. This was one area where they would go on to clarify and develop the law; how they did and the influences on them in doing so forms the basis of the next chapter, Chapter 3 (Law).

Individual criminal responsibility was also an underdeveloped concept in international law with little clear precedent as to its application. It was clear, however, given the contents of Article 7(1) and 7(3) of the ICTY Statute, that those who had not physically committed the crimes but who had contributed to them in various ways would also come within the remit of the ICTY.

This included those who had ordered the commission of crimes. Chapter 6 (Responsibility) considers how the ICTY judges applied this concept of individual criminal responsibility of commanders.

The rules of procedure and evidence governing what evidence could be presented to the judges and how were fundamental to the work of the ICTY, as they are to any court. The permissive nature of the rules governing the admission of evidence meant that the judges carried a heavy burden in assessing the value to be attributed to the masses of evidence before them. Chapters 4 and 5 describe the witness evidence that was so fundamental to the work of the ICTY in general and in relation to the application of the law of targeting, before considering how the judges approached this evidence and what influenced their decisions on it.

As mentioned above, the next chapter, Chapter 3 (Law), identifies how the judges of the ICTY developed the law of targeting and the influences underlying this development in the three cases of *Blaškić*, *Galić* and *Gotovina*. It does this through a consideration of how the judges approached certain key legal definitions of the law of targeting that were mentioned in relation to Article 51 API in this chapter. These are i) the principle of distinction, the concept that those carrying out military operations must always distinguish between civilian populations and objects and combatants/military objectives; ii) the definitions of Civilian and Civilian Population as well as that of Military objectives and iii) the principle of Proportionality, the rule that even a military objective should not be attacked if the expected harm to civilians from the attack would be disproportionate to the anticipated military advantage to be gained.

Introduction

This research set out to consider how the judges in certain cases at the ICTY had implemented the law of targeting and, given this, whether any factor(s) could be identified as influencing the many decisions on law, evidence and responsibility they had to make in reaching their judgments. It asked if it was the idea of humanity, broadly defined as a regard for the need to protect the innocent from the effects of war, that most influenced the judges in their demarcation of the law of targeting. The first element of the research question was how had the judges approached the law; to what extent did humanity, or any other concept or factors, influence the findings of the judges as regards the law of targeting? That is, where they were required to define the law and make legal findings as regards targeting were there any identifiable influences on the work of the judges?

This chapter will consider how the judges in each of the trials of *Blaškić*, *Galić* and *Gotovina* (and, where relevant, at appeal) defined and applied certain key concepts of the law of targeting. The law of targeting is defined here as the law governing what can and cannot be lawfully attacked; and if it can be attacked under what circumstances and conditions this may take place. In doing this it demonstrates that the judges of the ICTY developed the law of targeting and that there were certain identifiable key influences on this development.

This chapter makes the case for the conclusion that the ICTY has developed the law of targeting in line with the precedence of the principle of humanity and a worldview strongly guided by the International Committee of the Red Cross ('ICRC'). In affirming that the provisions of Additional Protocol I relating to targeting can be the basis for a conviction, the judges have rendered certain earlier provisions incorporating 'military necessity' (although not the broader principle itself) potentially obsolete in this context. It also seeks to demonstrate that the ICTY judges did not lose sight of the military viewpoint in interpreting the law and they considered that their judgments were always supported by a body of military opinion – even if in places there were those who did not agree.

This chapter therefore sets out a detailed consideration of the approach taken in each of the cases to three key elements of the law of targeting arising from the charges brought against the accused and the law this invoked as discussed in Chapter 2 (The framework for the demarcation of the law of targeting at the ICTY). These three elements are the principle of distinction, the definitions of civilian and civilian population/military objectives and the principle of proportionality.

Distinction

The case of *Blaškić* was critical to the law of targeting at the ICTY due to the judges' acceptance and incorporation of the offence of unlawfully attacking civilians. The *Blaškić* Trial Judges accepted that this offence was within their jurisdiction despite the fact that it was not specifically included in Article 3 of the ICTY Statute. The *Blaškić* Trial Judges could have refused to accept this innovation on the part of the OTP. The trial judgement also, however, contained a telling sentence that can be seen to demonstrate a shift that had taken place in the law since the Second World War and was confirmed by the work of the ICTY. This sentence was:

Targeting civilians or civilian property is an offence when not justified by military necessity.¹

The response to this statement demonstrated that the system of precedent adopted by the ICTY was fully functional.² It was quickly distinguished by the *Galić* Trial Judges³ and clearly corrected by the Appeals Chamber to reflect the fact that the law was now understood to be that targeting civilians could not be justified for any reason.⁴ More importantly for the content of the law of targeting, it also demonstrated the level of the change in the rules governing the protection of civilians which was fully accepted by the ICTY judges and promoted by the work of the ICTY.

¹ *Blaškić* Trial Judgement, paragraph 180.

² The concept of 'precedent' between the judgements of the various ICTY chambers was not mentioned either in the ICTY Statute or Rules of Procedure and Evidence. The ICTY Appeals Chamber in *Aleksovski* found that a 'proper construction of the Statute' required that appeal decisions bind the trial chambers, however, the Appeals Chamber could, in exceptional circumstances depart from its own decisions. (Case No. IT-95-14/1, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber Judgement of 24 March 2000 ('*Aleksovski* Appeal Judgement'), paragraphs 92-113.) Trial chambers were not bound by decisions of other trial chambers. (*Aleksovski* Appeal Judgement, paragraph 114).

³ *Galić* Trial Judgement, paragraph 44.

⁴ *Blaškić* Appeal Judgement, paragraph 109.

Hector Olásolo sees this *Blaškić* statement incorrectly incorporating a military necessity justification as evidence of the 'abusive use' of the crime of wanton destruction not justified by military necessity. In his mind, this misuse arises from the fact that attacks against civilians and disproportionate attacks are not specifically included in Article 3 of the ICTY Statute.⁵

Looking at the judgement itself, that this statement was ever made can be explained by a confusion or intermixing of the application of the principles relating to attacks on civilians and indiscriminate attacks (as set forth in API) with the crimes specifically included in Article 3 of the Statute, namely:

- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; and
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings.

The trial judges' approach can be seen in paragraph 170.⁶ In stating that 'The specific provisions of Article 3 of the Statute satisfactorily cover the provision of the said Protocol relating to unlawful attacks upon civilian targets' they circumvent any detailed consideration of the relevant provisions of API.⁷

In doing this, when they get to setting out the elements of the offence of an attack against civilians and civilian property in paragraph 180, they are using words (probably in part from the Prosecutor's Summary)⁸ that seem to reflect concepts belonging to API (for example, 'The parties to the conflict are obliged to attempt to distinguish between military targets and

⁵ Hector Olasolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (Boston: BRILL, 2007), 69-71.

⁶ *Blaškić* Trial Judgement, paragraph 170:

Taking into account the effect of the application of the fundamental principles of Article 3 of the Statute in this case, the Trial Chamber considers that it should not be necessary to rule on the applicability of Protocol I. The specific provisions of Article 3 of the Statute satisfactorily cover the provision of the said Protocol relating to unlawful attacks upon civilian targets. The specific provisions of Common Article 3 also satisfactorily cover the prohibition on attacks against civilians as provided for by Protocols I and II.

⁷ Although the judges do, although not considering it necessary, state that they find the Additional Protocols are applicable (*Blaškić* Trial Judgement, paragraph 172) they do not, however, go on to specifically mention breaches of the Additional Protocol incurring individual criminal liability, although it may be possible to read it into the relevant paragraph (*Blaškić* Trial Judgement, paragraph 176).

⁸ See W. J. Fenrick, 'Commentary: A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the *Prosecutor V. Tihomir Blaškić*', *Leiden Journal of International Law* 13, no. 04 (2000): 938-939. It appears he is setting out here what the prosecution did suggest to be the definition and it was based on API.

civilian persons or property')⁹ but trying to force them to fit the crimes specifically set out in Article 3 that they have already referred to - and which are not actually the same crimes.

Those writing this paragraph would not be the first non-practitioners of IHL to have made the mistake (post adoption of the Additional Protocols) of getting confused in considering how to articulate that collateral damage is permitted in the conduct of warfare. This raises interesting questions of the process of drafting a judgement - who actually drafted this paragraph, who checked it and was the person checking it sufficiently aware of the consequences of what was being said? Patricia Wald, a former judge at the ICTY, comments that the drafting of judgments at the ICTY was very different to that of a single judge drafting their own opinion; although a necessity given the large scale of the judgements involved. She points out that the judges' role of supervising the production of a judgment 'becomes monumental' when the judgment may be produced in a language that not all the judges can understand and by legal assistants who are not allocated to individual judges.¹⁰

On a more abstract level, it is clear in retrospect that the ICTY confirmed a fundamental shift in the approach to crimes related to civilian casualties in the midst of conflict through a preference for the API rules of distinction to those older rules citing 'military necessity'. The previous position can be seen in the judgments of the subsequent Nuremberg Military Tribunals whose judges allowed a broad reading of military necessity if it was included as a specific exception to the relevant Hague Regulations or if it was argued in relation to conduct that was not specifically covered by the Hague Regulations.¹¹ This led, for example, in the *High Command* case, to the tribunal acquitting von Leeb of charges relating to the siege of Leningrad (including using artillery to fire towards civilians trying to leave to force them back into the city) as it could be justified by military necessity given, as the tribunal found, that the Hague Regulations did not prohibit starvation as a weapon of war. The *Einsatzgruppen* tribunal, drawn into a discussion of the actions of the US, found that the bombings of Hiroshima and Nagasaki could be fully justified by military necessity as 'morale bombing' was not prohibited by the laws of war.¹²

⁹ Although the use of the term military 'targets' is also not quite right. It may also be a statement of the customary international law principle of distinction rather than the API version of this.

¹⁰ Patricia M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court', *Washington University Journal of Law and Policy* 5 (2001): 93-94.

¹¹ Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2012), 308-311.

¹² Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, 310.

Olásolo points out the clear incompatibility between the rules regulating the principle of distinction in the Additional Protocols (based on the concept of 'military objectives' and the proportionality rule) and the rules in Hague Convention IV of 1907 and its Annexed Regulations (based on the concept of 'military necessity') on which the original provisions of Article 3 of the Statute were based.¹³ Daniel Thürer notes in relation to military necessity that '[s]ome say that it no longer has any significance of its own, having been absorbed by the principle of proportionality.' He also notes, however, that the term is still used in practice.¹⁴

The ICTY has added weight to the approach of the Additional Protocols and in doing so made 'military necessity' irrelevant in the specific context of directly targeting civilians and civilian objects. The judges were willing to go much further than the Secretary General in assessing current customary law.

In contrast to the *Blaškić* Trial Judgement, in the *Galić* Trial Judgement the judges state that they understand the first sentence of the second paragraph of Article 51 API to be the basis of the charges of attack on civilians in Counts 4 and 7 - they describe it as the first part of Article 51(2).¹⁵ This sentence is that 'The civilian population as such, as well as individual civilians, shall not be the object of attack.'

The *Gotovina* Trial Judges state that 'Since there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law all attacks on civilians and civilian objects are unlawful' and base this on the *Blaškić* Appeal Judgement, paragraph 109; *Kordić and Čerkez* Appeal Judgement, paragraph 54, with corrigendum of 26 January 2005 and *Galić* Appeal Judgement, paragraphs 130 and 190.¹⁶ This demonstrates quite how conclusively this rule had become part of the jurisprudence of the ICTY, with no perceived need to return to the primary sources of the law to demonstrate its applicability.

¹³ Olasolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute*, 68.

¹⁴ Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (The Hague: Hague Academy of International Law, 2011), 71.

¹⁵ *Galić* Trial Judgement, paragraph 41.

¹⁶ *Gotovina* Trial Judgement, paragraph 1840.

Indiscriminate attacks

As stated in the *Galić* Appeal Judgement, 'No mention is made of indiscriminate or disproportionate attacks as the basis for conviction.'¹⁷ The Trial Chamber did, however, find that certain indiscriminate attacks could qualify as direct attacks against civilians and this was upheld by the Appeals Chamber:

The Appeals Chamber finds that the impugned finding does not conflate the two crimes but rather supports the view that a direct attack can be inferred from the indiscriminate character of the weapon used.

....

In principle, the Trial Chamber was entitled to determine on a case-by-case basis that the indiscriminate character of an attack can assist it in determining whether the attack was directed against the civilian population.¹⁸

William Fenrick gives a potential clue to how this approach was adopted. In discussing the *Blaškić* case he states:

It should also be noted that the prosecution argued that the occurrence of an attack wilfully directed against civilians could be established in a variety of ways: a) proof that only civilians were killed.... b) proof that combatants and civilians were killed without distinction; or c) proof that the number of civilians killed was excessive. The prosecution adopted this approach, notwithstanding the fact Art. 51(4) and (5) of Protocol I explicitly refer to indiscriminate and disproportionate attacks, for two reasons: a) Protocol II does not explicitly refer to indiscriminate or disproportionate attacks and there was a desire to have a common offence for all conflicts, and b) it was the view of the prosecution that indiscriminate attacks, including attacks resulting in excessive civilian casualties, were, in substance, attacks directed against the civilian population.¹⁹

It seems that much of the evidence given in the cases of *Galić* and *Gotovina* fit the definition of indiscriminate attacks as set out in Articles 51(4) and (5) API. The section of the *Galić* Trial Judgement on control over shelling activity includes description by soldiers of the indiscriminate use of weapons. The *Gotovina* trial also included discussion of the types of weapons used. For example, in Leslie's testimony he highlights the use of 'area' weapons systems and when questioned as to whether these systems were capable of distinguishing

¹⁷ *Galić* Appeal Judgement, paragraph 134.

¹⁸ *Galić* Appeal Judgement, paragraph 132.

¹⁹ Fenrick, 'Commentary: A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the *Prosecutor v. Tihomir Blaškić*', 931–47.

between military targets and the civilian structures that surround them, he replies 'simplistically, no'.²⁰

The *Galić* Trial Judgement refers to Henneberry having 'visited artillery emplacements and observed the weaponry being indiscriminately fired into the city'.²¹ Henneberry's testimony that led to this statement is a view into what the trial chamber had in mind when making findings relating to 'indiscriminate' targeting in the context of Sarajevo. It is worth describing in some detail as a key instance of eyewitness testimony as to the actions of those soldiers firing artillery into Sarajevo. Henneberry testified that his view was formed from observing:

numerous times soldiers firing weapons, indirect weapons, artillery and whatnot, without aiming, firing while they were intoxicated, moving some of the weapons by hand without aiming, firing what is called over open sites for an indirect weapon, which is not the proper procedure, and in discussions with the soldiers themselves.²²

He was then asked to expand and explain some of these points, during which he gave evidence of soldiers simply not caring where mortars were aimed, including simply kicking a weapon into place before firing it wherever it stopped:

Q. When you say, "moving some of the weapons by hand without aiming," what exactly do you mean?

A. If I may use an example of a mortar, for instance. It is a tube that points towards the sky and there should be a number of wheels and sights, optical sights with wheels, to which you move the barrel minutely by varying degrees. That is the only way a mortar can be fired accurately to the target it was intended, not a pinpoint target. I personally witnessed several times the soldiers moving it by hand or them by hand without checking their sights, without knowing where the round would land when fired, and in some cases, they actually just kicked the weapon. Whenever it stopped was fine, and they would fire that way.

He also explained how he had seen artillery pieces being fired without any use of the mechanisms by which they can produce relatively accurate fire:

Q. Taking you back to your earlier explanation as to your observations which led you to your view, you also said that you observed what is called "over open sites," firing over open sites for an indirect weapon. Could you explain that to us?

A. Yes, sir. Similar to not using the optical sights to be precise on an indirect weapon, such as a mortar, artillery pieces use the same principal of a series of gears and sights fairly precise. On numerous occasions, I observed the soldiers simply looking with their naked eye down the barrel, moving it slightly, and firing that way, moving it by

²⁰ *Gotovina* Trial Testimony, 22 April 2008, page 1984.

²¹ *Galić* Trial Judgement, paragraph 669.

²² *Galić* Trial Transcript, 16 May 2002, page 8551.

hand slightly without the use of the correct gears, and estimating where it would land, and firing the rounds.

And perhaps most importantly, Henneberry also testified as to being told ‘frequently’ by the soldiers:

that they would just fire because they wanted to, at no particular target, on occasion. They were also or, rather, they also told me that sometimes they would fire in the case of another position just by the time of day in the general area of a target. And, again, with an indirect weapon, the method in which they moved them, it meant that there was no accuracy to it.²³

‘Indiscriminate’ in the sense of Henneberry’s testimony clearly means that the soldiers firing the weapons did not have a military objective in firing the shots and did not care where the shots landed; they were not using the means provided to fire the weapons at a particular location while at the same time clearly firing into a city with a significant civilian population. This is a case of not even aiming at a target – military or otherwise – and it was clearly done with the intention of harming civilians or, at the very least, with not caring if they were harmed or not.

This evidence from Henneberry is a rare example of the view from where the shots are being fired. The majority of the assessment of the state of mind of those firing the shots was produced from the effects produced. The idea that the ‘wilfulness’ of an intended target of an attack could be established from its effects is problematic, as Fenrick and the prosecution team well knew. How the judges approached this is discussed in Chapter 5 (Evidence II: Finding criminal intent).

Despite the Appeals Chamber upholding the idea that indiscriminate attacks can amount to direct attacks while they are still also separate concepts there has clearly been some conflation or overlapping of direct and indiscriminate attacks. Jens Ohlin makes the point in relation to the targeting cases at the ICTY that ‘surely at least some of these scenarios involve attacks that were not intentionally directed at civilians, and ought to be analysed under the ... rubric of proportionality’.²⁴ Ohlin’s theory is discussed further below in the section on proportionality.

²³ *Galić* Trial Transcript, 16 May 2002, pages 8551-8554.

²⁴ Jens David Ohlin, ‘Targeting and the Concept of Intent’, *Michigan Journal of International Law* 35 (2013): 87.

Definitions of Civilian, Civilian Population and Military Objectives

The situation regarding the civilian status or otherwise of those in Sarajevo and in Bosnia in general, as well as in Croatia, was not always straightforward. Various civil protection or territorial defence groups were established, some were, or became military organisations, some were not or did not. Certain police forces were civilian, others were military in nature. There was also often a question of the intermingling of the civilian population and the military. This section looks at the evidence presented to the judges as to the nature of the populations under consideration and their decisions based on this.

The fighting in the Yugoslav war took place in cities, towns and villages with significant civilian populations still present. Lieutenant Colonel Bryan Watters, a British soldier, second in command of the 1st Battalion of the Cheshire Regiment stationed in Vitez at the time of the events in question, summed up the nature of the difficulty in assessing the civilian nature or otherwise of occupation of houses where fighting was taking place in the Lašva Valley while describing the situation of one particular village:

The target for the artillery was the village itself. The fact that the village was holding out obviously meant it was being defended. I believed that the model that we had seen in the other villages in the Lasva Valley was being applied to Kruscica, and that was to ethnically cleanse it, but it was obviously being able to defend itself far better than other than people had, because it was more of a defended locality. I cannot say that the specific civilian houses were being targeted, other than military positions, because those civilian houses may well have been military positions, but we did not believe there was any other reason for attacking it other than the reasons they had attacked the other villages in the Lasva Valley, which was to remove the population.²⁵

This highlights that because the village was being defended, presumably by some form of a military presence, questions could be asked as to what military objectives were present and what remained civilian in nature. The fact that a village was the target for the attack because of a desire on the part of the attackers to remove the Bosnian Muslim population from the area was also highly relevant, although legal logic dictates that an attack in a combat situation has to be unlawful pursuant to the laws of war before it can be considered as a crime against humanity or any other offence.²⁶

²⁵ *Blaškić Trial Transcript*, 10 November 1997, pages 3397-3398.

²⁶ William J. Fenrick, 'Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities', *Boston College International and Comparative Law Review* 30 (2007): 134.

To demonstrate just one aspect of the potential intermingling of the civilian and military in Sarajevo that the judges had to contend with, questions were raised as to the nature of the Civil Defence/Protection in Sarajevo and its relationship with the ABiH. It is clear from the testimony of Ismet Hadžić, Commander of the Dobrinja Brigade of the ABiH, that although the Civil Defence was a separate organisation to the army, there were elements of overlap between them. Hadžić testified in relation to the Civil Defence organisation that

It was separate. It wasn't under the military command. So I repeat, it had a separate command. We didn't have command over it, but we did help them. Because they had a lot of duties, so when they lacked the manpower, we would provide our manpower for them, so they could accomplish the tasks that they were supposed to accomplish.²⁷

There was clearly the possibility that soldiers were working next to civilians, that there might not be a clear line between military and civilian activities within the city.

Civilian and Civilian Population

The *Blaškić* Trial Judges state that civilians 'within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces'. They do not give any authority for this statement and it is not clear if the Article 3 is a reference to Common Article 3 to the Geneva Conventions or Article 3 of the ICTY Statute.²⁸ It also contrasts with the more detailed consideration given to the definition of a civilian population for the purposes of charges of crimes against humanity under Article 5 of the ICTY Statute and in which the judges cite previous ICTY and ICTR jurisprudence relying on Article 50(3) of API in defining the civilian population.²⁹ Article 50(3) states that:

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Again in the context of the charges of crimes against humanity, the *Blaškić* Appeal Judges confirmed the relevance of the definition of civilians and civilian populations in Article 50 API, stating that 'the provisions in this article may largely be viewed as reflecting customary law'.³⁰

²⁷ *Galić* Trial Transcript, 23 July 2002, page 12221.

²⁸ *Blaškić* Trial Judgement, paragraph 180.

²⁹ *Blaškić* Trial Judgement, paragraph 211.

³⁰ *Blaškić* Appeal Judgement, paragraph 110.

They also confirmed the relevance of Article 50(3) API and cited the ICRC Commentary as to the specifics of its application.³¹

This cross-over of definition also occurred in the *Gotovina* Trial Judgement.³² Gotovina was charged with carrying out unlawful attacks as one of the underlying acts of persecution, that is, within a charge of crimes against humanity. The judges stated that 'Since there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law all attacks on civilians and civilian objects are unlawful'.³³ They defined the term 'civilian' for the purposes of the definition of unlawful attacks as an underlying act of persecution (as a crime against humanity) by reference to chapters 5.2.1 and 5.5.1 - that is, to their statements of the law applicable to crimes against humanity (Article 5 of the ICTY Statute) for the term 'civilian' and the law applicable to 'Wanton Destruction' charged as a violation of the laws or customs of war (Article 3(b) of the ICTY Statute) for 'civilian objects'.³⁴ In both cases, the definitions are those given in Additional Protocol I - Article 50 and Articles 52(1) and (2) respectively.³⁵ In using Article 50 API to define 'civilian' the judges state that they are following Appeals Chamber jurisprudence and give references to the *Blaškić*, *Kordić and Čerkez*, *Galić* and *Martić* Appeal Judgements.³⁶

The *Gotovina* judges also mention that they had 'considered' the evidence given by the expert witnesses Konings and Corn as regarded 'the military or civilian nature of the objects fired at in Knin' with a footnote that they were at this point considering 'primarily whether firing at the objects offered a definite military advantage' and not pronouncing 'on the proportionality of these attacks in view of the risk of incidental loss of civilian life, injury to civilians, or damage to civilian objects'.³⁷ That is, they are again using some of the specific language of API.

It is difficult from these cases alone to establish whether 'civilian' and 'civilian population' are to be considered as the same concept with exactly the same definitions under the law relating to war crimes and the law relating to crimes against humanity. Within the broader

³¹ *Blaškić* Appeal Judgement, paragraph 115.

³² *Gotovina* Trial Judgement, paragraphs 1840-1842.

³³ *Gotovina* Trial Judgement, paragraph 1840.

³⁴ *Gotovina* Trial Judgement, paragraph 1841.

³⁵ *Gotovina* Trial Judgement, Volume II, paragraph 1705, footnote 765 and paragraph 1766, footnote 867.

³⁶ *Gotovina* Trial Judgement, Volume II, paragraph 1705, footnote 765: '765 *Blaškić* Appeal Judgement, para. 110; *Kordić and Čerkez* Appeal Judgement, para. 97; *Galić* Appeal Judgement, para. 144; *Martić* Appeal Judgement, para. 302.'

³⁷ *Gotovina* Trial Judgement, Volume II, paragraph 1899 and footnote 931.

jurisprudence of the ICTY, Gideon Boas, James Bischoff and Natalie Reid point out that despite the appellate jurisprudence applying the same definition of 'civilian' for both war crimes and crimes against humanity,³⁸ this approach of applying Article 50(1) API to define a civilian for the purposes of crimes against humanity has not gone completely unchallenged by the ICTY trial chambers (who have in some cases applied a broader definition based on Common Article 3). They highlight the 2005 *Limaj* Judgment which stated that 'the definition of "civilian" employed in the laws of war cannot be imported wholesale into discussions of crimes against humanity', recalling the *Tadić* Trial Judgement's statement that the provisions of Common Article 3, Additional Protocol I and the commentary to Geneva Convention IV 'can only be applied by analogy'.³⁹ They also point out that Article 50(1) is a narrower provision than that in Common Article 3 because it is part of an approach specific to the new approach taken by API (compared to the 1949 Geneva Conventions themselves) to identify who can and cannot be 'targets of military action'.⁴⁰ This again confuses matters for the charges of unlawful attack as persecution/crimes against humanity where the rules on targeting are of particular relevance. It can perhaps be concluded that as far as the unlawful attack charges that were brought under persecution headings in *Blaškić* and *Gotovina* are concerned, the definition of civilians and civilian populations were treated the same as if it had been brought as a war crimes charge and API has been confirmed as providing the relevant definitions.

Having found that attacking civilians is a crime that exists under both customary and conventional law, the *Galić* Trial Judgement sets out in some detail the provisions of API as they apply to the definition of civilians and civilian populations in the specific context of defining the crime of an attack on civilians charged under Article 3 (War Crimes).⁴¹ As well as considering the effect on the civilian population of the presence of combatants, another detail mentioned here is the loss of protection for individual civilians for any time that they directly participate in hostilities.⁴² The judges cite paragraph 1944 of the ICRC Commentary for their proposition that to 'take a "direct" part in the hostilities means acts of war which by their

³⁸ Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library Volume 2: Elements of Crimes Under International Law* (Cambridge: Cambridge University Press, 2009), 286.

³⁹ Boas, Bischoff and Reid, *International Criminal Law Practitioner Library Volume 2: Elements of Crimes Under International Law*, 47-48.

⁴⁰ Boas, Bischoff and Reid, *International Criminal Law Practitioner Library Volume 2: Elements of Crimes Under International Law*, 44-45.

⁴¹ *Galić* Trial Judgement, paragraphs 47-50.

⁴² *Galić* Trial Judgement, paragraph 48.

nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces'.⁴³

In relation to the definition of a civilian population, the *Galić* Appeal Judges set out that although the statement in the Trial Judgement that 'The presence of individual combatants within the population does not change its civilian character'⁴⁴ did not properly reflect ICTY jurisprudence (which was that it 'does not necessarily' change its character), given their reference in the related footnote to the ICRC Commentary,⁴⁵ the trial judges had in fact appreciated the nuances of the law.⁴⁶ This definition of a civilian population is key to the *Galić*

⁴³ *Galić* Trial Judgement, paragraph 48 citing Article 51(3) of API.

⁴⁴ *Galić* Trial Judgement, paragraph 50.

⁴⁵ *Galić* Trial Judgement footnote 91:

See Article 50(3) of Additional Protocol I. The Commentary to this paragraph notes that: "[i]n wartime condition it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population." ICRC Commentary, para. 1922.

⁴⁶ *Galić* Appeal Judgement at paragraphs 136-138.

136. The Appeals Chamber observes that there is nothing in the Defence Appeal Brief that identifies what in particular the Trial Chamber purportedly interpreted erroneously or "onesidedly". The Appeals Chamber notes, however, the seemingly absolute nature with which the Trial Chamber asserted that the presence of combatants within the civilian population "does not" change its otherwise civilian character.⁴¹⁶ The Appeals Chamber finds that the jurisprudence of the International Tribunal in this regard is clear: the presence of individual combatants within the population attacked does not necessarily change the fact that the ultimate character of the population remains, for legal purposes, a civilian one. If the population is indeed a "civilian population", then the presence of combatants within that population does not change that characterisation. In the *Kordić and Čerkez* Appeal Judgement, the Appeals Chamber stated:

The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

The Appeals Chamber considers that Article 50 of Additional Protocol I contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law.

137. If, however, one is discussing whether a population is civilian based on the proportion of civilians and combatants within it, that is, the status of the population has yet to be determined or may be changing due to the flow of civilians and military personnel, then the conclusion is slightly different. The *Blaškić* Appeal Judgement qualified the general proposition of the *Kordić and Čerkez* Appeal Judgement with an important addendum. It states, quoting the ICRC Commentary, that "in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population." As such, the Appeals Chamber in *Blaškić* found that "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined".

case given that there were a large number of soldiers mixed in with the general population throughout the conflict. In relation to the shelling of the football match, seemingly in the context of establishing that the crowd present did not constitute a military objective, the trial judges state that the majority 'understands the evidence to show that there were soldiers present at the parking lot, who were off-duty, unarmed and not engaged in any military activity. It finds that, although soldiers were present at the improvised football pitch, the crowd gathered there was carrying out a civilian activity, i.e., playing football'.⁴⁷ This seems to be highlighting that the civilians present were not taking part in any hostilities at the time so there was no way they could have lost their protection pursuant to Article 51(3) API.

Further on, the *Galić* Trial Judges also, however, consider what the position would have been if the SRK had been intending to target the soldiers. They find that given the composition of the crowd, any such attack would have been disproportionate.⁴⁸ This implies that there could have been a composition of the crowd for which the attack would not have been disproportionate.

The application of the principle of proportionality is discussed further below, but there is also a question left as to what this means for the purpose of the definition of the civilian population. In this regard there is an interesting distinction made in the *Galić* Appeal Judgement between the presence of combatants in what has already been established as a 'civilian population' and a situation where 'one is discussing whether a population is civilian based on the proportion of civilians and combatants within it, that is, the status of the population has yet to be determined or may be changing due to the flow of civilians and military personnel'. This supports the idea that there is a proportionality calculation to be made in defining a civilian population where there is an intermingling of civilians and military personnel.

138. The strict test apparently posited by the Trial Chamber, namely that the presence of combatants within the civilian population "does not" change its status, may seem to depart from the above finding of the Appeals Chamber. However, in footnote 91 of the Trial Judgement, the Trial Chamber acknowledged the nuances of its position by referring to the above quotation of the ICRC Commentary, as referred to in the *Blaškić* Appeal Judgement. The Appeals Chamber therefore finds that the Trial Chamber was correct in its interpretation of the law in paragraphs 50 and 51 as it recognised the variable considerations with respect to determining the characterisation of a given population. *Galić's* argument is accordingly dismissed.

⁴⁷ *Galić* Trial Judgement, paragraph 386.

⁴⁸ *Galić* Trial Judgement, paragraph 387.

The *Galić* Appeal Judges go on to mention the finding in the *Blaškić* Appeal Judgement that ‘in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined’, which they noted that in turn was based on the ICRC Commentary that ‘in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.’⁴⁹ As the judges seem to be acknowledging, this implies something other than a strict proportionality calculation given that the activities of the soldiers present, rather than simply their status, are brought into consideration.

Commander Jacques Kolp gave a description illustrating the point that the presence of some soldiers would not have made the Markale Marketplace into a military objective:

Q. When you say, "there was no specific military objective at that particular point," what point are you referring to?

A. Well, the Markale market is a market like you see everywhere in the world. I say it is a place where everybody knows exactly that there is a lot -- there are a lot of the people and that is a place you could find some food or something of everything. There was really this and that. And every day the market was overbrimming with people. That doesn't mean that there wasn't a person here or there wearing military clothes or who had gone out to do some shopping. As I said, everyone who was young enough, even young people who could wear the uniform was in the army.⁵⁰

As, before him, the ICRC Commentary and, after him, the *Blaškić* and *Galić* Appeal Judges highlighted, Kolp is describing a civilian purpose behind any presence of soldiers that should not be taken to mean that those in the market were not a civilian population.

Based on an analysis of the testimony in the *Galić* and *D. Milošević* cases, Claire Garbett concludes that in fact, and in contrast to the neutral although negative IHL definition of a civilian found in API, social characteristics such as age or sex are applied in the ‘construction of the legal recognition (or not) of civilian persons’.⁵¹ She particularly had in mind the status of young men in Sarajevo who were to a certain extent presumed to be engaged in military activities. She also identified patterns within the civilians’ descriptions of their own status that

⁴⁹ *Galić* Appeal Judgement, paragraphs 136-137.

⁵⁰ *Galić* Trial Testimony, 13 May 2002, pages 8248-8250.

⁵¹ Claire Garbett, *The Concept of the Civilian: Legal Recognition, Adjudication and the Trials of International Criminal Justice* (Abingdon: Routledge, 2015), 111.

could form elements of a positive identification alongside the fact that they did not contribute to any military activity; there was an emphasis on protecting themselves and their families, on simply trying to survive in a besieged city. A key point she draws from this was that there were those who made an active choice to be a civilian, they did not simply just not happen to participate in military activities.⁵² Garbett's analysis of testimony and judgements in these cases is interesting as it shows that the apparently neutral definitions employed in API are not necessarily capable of neutral application in the adjudication process. The judges in the cases at hand did not, however, seek to question the API definition on this level for their definitional purposes.

The *Blaškić* Trial Judges, however, appear to have gone one step further than the judges in the other cases or the accepted IHL position in their definition of a civilian population. Fenrick identifies a 'tendency to regard ad hoc ill equipped resistance to an attack as equivalent to no resistance'.⁵³ Olásolo describes this as 'equating the existence of a weak defence with the non-existence of defence' and points out that any organised defence, no matter how ineffective, constitutes active participation in hostilities removing the civilian status of those taking part, criticising the judgements that have failed to sufficiently take this distinction into account.⁵⁴

Olásolo states that the exception to the loss of civilian status in these circumstances is when force is used as an 'isolated act of self-defence'.⁵⁵ Fenrick considers that 'the question is one of degree' as to whether civilians would lose their protection in these circumstances, even given the lack of authority on this point.⁵⁶ What the judges' tendency in *Blaškić* shows, at the least, is the difficulty in applying a conduct of hostilities definition to what was ultimately, in the context of the ethnic cleansing of the villages in the Lašva Valley, violence directed against civilians. Elvir Ahmić testified as to what his father, who had been one of the residents of the village carrying out armed patrols, had told him of the day of the Ahmići massacre:

He moved from the mosque in the direction of our house but he could not, because they were shooting at him, so he tried a round about way to reach our house and he

⁵² Garbett, *The Concept of the Civilian: Legal Recognition, Adjudication and the Trials of International Criminal Justice*, 106-107, 150-151.

⁵³ Fenrick, 'Commentary: A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor V. Tihomir Blaškić', 946.

⁵⁴ Olasolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute*, 116-117.

⁵⁵ Olasolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute*, 116.

⁵⁶ Fenrick, 'The Prosecution of Unlawful Attack Cases before the ICTY', 173.

could not, and then these people who were fleeing established some kind of a position, and they stayed there until they had no more ammunition left.⁵⁷

Given the implications of this short insight, Elvir Ahmić's father unable to reach his family, doing what he could together with the three other men with him, but unable to substantially alter the course of what was happening around them, the judges' approach was perhaps an application of the broader principle of 'humanity' in a grey area between individual self-defence and direct participation in the hostilities.

Military Objective

Although the *Blaškić* Trial Judges do not define 'military objective' they do use the term. In considering whether the attacks launched against Ahmići, Šantići, Pirići and Nadioci on 16 April 1993 were an attack against the Muslim civilian population, the Trial Judges find an absence of military objectives to justify the attacks.⁵⁸ In relation to the 'booby-trapped lorry of 18 April 1993' the judges cite Colonel Watters who stated that 'certainly it was not a legitimate act of war in pursuit of military objectives'.⁵⁹

In contrast, in relation to the villages Donja Večeriska, Gaćice and Grbavica the *Blaškić* judges found that there were legitimate military reasons for the HVO to attack these villages. They state that these villages 'could have represented a military interest such as to justify their being the target of an attack'.⁶⁰ In the case of Donja Večeriska and Gaćice, two villages on either side of a weapons factory already in the control of the HVO, this was due to 'evidence of a noteworthy ABiH presence'.⁶¹ The judges found that the Grbavica hill 'had a certain strategic importance, which enabled the ABiH, if it occupied it, to block the HVO and the Croatian civilians' access to the main Travnik-Busovača road' and that 'the ABiH was occupying certain private houses and that, consequently, those dwellings became legitimate military targets'.⁶²

The *Blaškić* Appeal judges also do not define 'military objective' while continuing to discuss its application by the Trial Judges, in particular in regard to the finding of a lack of a military

⁵⁷ *Blaškić* Trial Transcript, 2 October 1997, pages 3291-3292.

⁵⁸ *Blaškić* Trial Judgement, paragraphs 402-410.

⁵⁹ *Blaškić* Trial Judgement, paragraph 511.

⁶⁰ *Blaškić* Trial Judgement, paragraph 560.

⁶¹ *Blaškić* Trial Judgement, paragraph 542.

⁶² *Blaškić* Trial Judgement, paragraphs 551 and 556.

objective to justify certain orders given by Blaškić in relation to the attack on Ahmići and surrounding villages. They find that there was in fact a 'military justification' for Blaškić's actions, namely 'there was a Muslim military presence in Ahmići and the neighbouring villages, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmići-Santići-Dubravica axis'.⁶³

As can be seen from these references, the *Blaškić* judges are all using a mixture of terms such as 'military objective', 'military target' and 'military reason' interchangeably. In the *Blaškić* Appeal Judgement, the judges do use provisions of API which refer to military objectives for definitional purposes (for example, in setting out the API definition of indiscriminate attacks in Articles 51(3), (4) and (5) API)⁶⁴ but not to define a military objective itself. The witnesses testifying before the judges, such as Colonel Watters, also used such a mixture of terms and it is perhaps their language the judges have adopted. The use of 'military target' by the witnesses and judges is also evident in the other cases under discussion as can be seen below.

In contrast, the *Galić* Trial Judges set out that 'a widely accepted definition of military objectives' is that contained in Article 52(2) API.⁶⁵ Other than setting out the provision of Article 52(3), however, the judges did not enquire any further into this definition.

Individual witnesses, with military experience/training or not, were asked about 'military activity' in the city in general or in the vicinity of shelling events they had witnessed. This was not premised on any particular definition of such military activity, it was for the judges to assess what was relevant from the information they were provided with. For example, Richard Mole, a former Senior Military Observer for Sarajevo (holding the rank of Lieutenant-Colonel in the British army at the time he was in Sarajevo) told the court of his understanding of the potential legitimate military targets in the city:

Clearly, any activity around front lines, any activity around known headquarters, any activity around logistics elements, I would consider military targets. The remainder definitely wasn't.⁶⁶

In further testimony, however, the picture became less clear as Mole set out in more detail the potential location of the various military targets he had identified:

⁶³ *Blaškić* Appeal Judgement, paragraph 333.

⁶⁴ *Blaškić* Appeal Judgement, paragraph 157.

⁶⁵ *Galić* Trial Judgement, paragraph 51.

⁶⁶ *Galić* Trial Transcript, 7 June 2002, page 9812.

Q.Witness, yesterday you spoke about a distance of 500 to 600 yards when you talked about the depth of the front. Do you remember that?

A. Yes.

Q. Thank you. You told us that behind this first, so to speak, technical zone, there was a logistical zone and then a command zone after that one. Do you remember that?

A. Yes.

Q. Can you tell us what the depth was of these two rear zones, that is, the logistical one and the command zone?

A. No. That is applying an exact science to something that isn't that exact.

Q. I fully agree with you. But can you just give us an idea?

A. The resupply of the front line within the city would, of course, use many routes to fulfill their task. You would be unable to be specific in terms of a zone or an area for resupply.

Q. Very well. Let me ask you the following question: To the extent that these rear zones were used for logistical or command purposes, was it -- could these zones be identified as zones of a military character? Could that constitute a military target?

A. They would not be zones of a military character. They would be supplies, items required on the front line, passing through them.⁶⁷

This demonstrated that there were, at the least, military supply routes running through otherwise non-military areas.

It was also made clear to the judges that a military objective was not necessarily simply an object to be attacked or destroyed. For example, an SRK Intelligence Officer, Milorad Bukva, testified as to the SRK's objective of dividing the territorial possession the city of Sarajevo along the existing confrontation lines:

A. Yes, yes. Most of the members of the Sarajevo Romanija Corps and most of the command personnel, they knew what the war objective of the SRK was. It was defined by the assembly decision which practically confirmed the situation on the ground which was the division of the city.

Q. You say the actual situation on the ground and the division of the city. Are you referring to the lines that were established between the Territorial Defence on the Serbian side and members of the organised Muslims units on the other side?

A. Yes.

Q. In your opinion, was that the objective that had been set?

A. Yes, and I'd like to repeat that that was the decision taken by the assembly.⁶⁸

Tucker highlighted an additional element to the consideration of military objectives, namely that of precautions in attack. In the context of the potential use of civilian vehicles for military purposes there was the following exchange:

⁶⁷ *Galić Trial Transcript*, 4 July 2002, page 11116.

⁶⁸ *Galić Trial Transcript*, 27 January 2003, pages 18318-18319.

Q. ...Therefore, such a [civilian] vehicle, would you then consider it as a military target, if this vehicle is transporting military personnel?

A. I would consider it, as a military officer, to be a military target, but I would also have to take into account the risk of my being wrong and it not being a military target before I personally decided to shoot at it.⁶⁹

The *Gotovina* Trial Judges did not define military objectives as such, but they did discuss a list of potential military objectives in some detail. They also mention the guidance they were given by the expert opinion they had heard on the subject. They found that ‘the opinion of the expert as to whether, and why, he considers a target to be a legitimate military objective, although ultimately to be determined by the Trial Chamber, may assist it in making decisions in relation to the criminal liability of the accused’.⁷⁰ The Defence expert Professor Geoffrey Corn mentioned the rules in Additional Protocol I through his testimony, although never referring to the actual definition of military objective provided therein.⁷¹

The *Gotovina* Trial Judges also heard significant evidence as to restrictions on attacking military objectives. Andrew Leslie, Chief of Staff of Sector South of the UN Protection Force’s Croatia Command, located in Knin, at the time, with significant artillery experience and who at the time of testifying was the Chief of Land Staff in the Canadian Armed Forces, for example, gave evidence as to what was a ‘legitimate military target’:

A legitimate military target is one which is deemed by an attacking commander to have a significant military value, one in which its neutralisation or destruction will provide a significant advantage to the attacking force, and one which has military utility which is current. There are other criteria, but I would have to refer to notes to get more specific.⁷²

But then, when asked ‘[o]nce a legitimate military target... is identified, does that mean that it can then be shelled?’ he answered:

No, sir, most absolutely not. Identifying a legitimate military target is merely the first step in a process. The second step is determining its current military relevance, it's utility, the possibility of collateral damage to innocent lives or civilian structure, the military utility of prosecuting that target commensurate with the rules of law, what type of weapon system you have to engage that target to avoid the potential of

⁶⁹ *Galić* Trial Transcript, 17 June 2002, page 9975.

⁷⁰ *Gotovina* Trial Judgement, paragraph 36.

⁷¹ *Gotovina* Trial Transcript, 7, 8 and 11 September.

⁷² *Gotovina* Trial Transcript, 22 April 2008, page 1982.

collateral damage, and then finally, of course, the gut check to see whether or not you think it's the right thing to do considering all the factors.⁷³

This examination of Leslie led to an interesting exchange with Judge Orié which shows some of Judge Orié's thoughts as regards the value of this sort of evidence:

Q. Let me direct your attention to the residential areas to which you saw corrected fire being directed. What if, for example, a significant military figure lived in one of the apartment buildings located within that residential area, would that mean that the corrected fire you saw being directed into the residential neighbourhood, therefore, be permissible and would that render your conclusions drawn in the August 12th statement -- report wrong?

A. Sir, I will offer you my opinion based on a variety of years of experience in these matters --

JUDGE ORIE: Mr. Kehoe.

MR. KEHOE: He's offering his opinion; he's not an expert.

JUDGE ORIE: Well, as I said before and as is found in the Chamber's decision, that sometimes it's not easy to distinguish, especially when you have professionals testifying.

Mr. Tieger, what I notice at this moment is the following: That you started asking the witness about what he considers to be a military target, a legitimate military target. I had already some doubts at this moment, but at the same time, I thought it might be good to know whether this witness understands this, to be whether that's correct or not. And then what was done is that we actually moved from what a legitimate military target is into the process of decision-making on whether or not to attack a certain target. For example, the type of weaponry used is not -- is, of course, a consideration which may be of importance; at the same time, it does not change the target as a legitimate military target automatically. Let's try to focus at this moment, first of all, on facts, because your question was of a high hypothetical nature, at least you have chosen to make it a hypothetical question. I could imagine that a similar question in a less hypothetical way would be put to the witness, but let's try not to lose ourselves in hypothesis.⁷⁴

Judge Orié was not opposed as such to a witness who is not designated an 'expert' giving his opinion on matters in which he has significant knowledge and experience. He wanted to see what the witness' understanding of the situation was. The judge was, however, more concerned with establishing facts than going through hypothetical situations with a witness. What is also interesting is that Judge Orié has in his mind the presence of a 'legitimate military target' but also the relevance of the means by which it may be attacked -- that is 'the type of weaponry used'.

⁷³ *Gotovina* Trial Transcript, 22 April 2008, page 1982.

⁷⁴ *Gotovina* Trial Transcript, 22 April 2008, pages 1982-1984.

In the trial judgement, the judges did rely on Leslie's testimony, among others, in identifying the military objectives that were present in Knin and that appeared to have been targeted.⁷⁵ This included the statement:

With these two exceptions and according to Leslie's observations, the legitimate military targets in Knin were not hit in any significant manner.⁷⁶

It is clear that in defining the concepts of civilian and civilian population that the rules of the Geneva Conventions and their Additional Protocols are the key sources used by the judges. Where a definition was provided for 'military objective' this too was from the provisions of API. The next section will consider the definition and use of the term 'Distinction'.

Koševo Hospital

Although it was not specifically mentioned in the indictment, as a scheduled shelling incident or otherwise, the *Galić* Trial Chamber decided to make a finding on the evidence they had heard regarding the Koševo hospital. This is interesting as, given the evidence showed that the grounds of the hospital had been used by the ABiH to launch attacks against the SRK as well as that the hospital had been the subject of attacks, they were therefore pronouncing on one of the most difficult areas of targeting law, namely, when can an object that is ordinarily clearly protected by IHL become a military objective for the purpose of a particular attack?

The Trial Chamber used witness Harding's conclusions as well as those of Mole, Senior UNMO from September to December 1992, Jacques Kolp, UNPROFOR Liaison Officer with the ABiH from March 1993 to November 1994 and Morten Hvaal, a Norwegian photojournalist who lived close to the Koševo Hospital, in setting out findings that although there was some outgoing fire from the hospital grounds that did draw return fire, the SRK were at times in fact targeting the hospital as such and not simply trying to counter-attack against those firing at them.⁷⁷

It is implicit in their conclusion that 'nevertheless' there was also fire that 'was certainly not aimed at any possible military target ' that they did not consider return fire towards the

⁷⁵ For example, *Gotovina* Trial Judgement at paragraphs 1213, 1278.

⁷⁶ *Gotovina* Trial Judgement, paragraph 1278.

⁷⁷ *Galić* Trial Judgement, paragraph 508.

hospital as unlawful.⁷⁸ They, however, used quite detailed consideration of the types of attacks against the hospital to show that it was at times the hospital as such that was being targeted, not those using its grounds to launch an attack.

The *Galić* Appeal Judgement covers the law applying to the use of hospital grounds at the Koševo Hospital by the ABiH for launching attacks at the SRK forces in detail, partially overturning the Trial chamber's findings.⁷⁹ The Appeals Chamber states that the Trial Chamber's 'conclusion that the firing on the Koševo hospital buildings "was certainly not aimed at any possible military target" is partially incorrect'.⁸⁰ This does not feel completely honest when compared to the Trial Chamber's full sentence and their conclusions as a whole. The Trial Chamber, having found that ABiH mortars were fired from the hospital grounds or its vicinity, stated that 'Nevertheless, the evidence does reveal that, on occasions, the Koševo hospital buildings themselves were directly targeted, resulting in civilian casualties, and that this fire was certainly not aimed at any possible military target'.⁸¹

Given that both the Trial and Appeals Chambers conclude that some of the attacks on the hospital were not attacks on a legitimate military target, the Appeals Chamber seems to have had reservations about how the Trial Chamber came to this conclusion rather than the conclusion itself. They set out in some detail the basis on which a hospital would lose its protected status. The Appeals Chamber states that 'If the hospital, whether the building or the grounds, was used as a base to fire at SRK forces, then the hospital was, at least temporarily, a military target'.⁸² The Appeal Judgement sets out that for a certain time the hospital as a whole will become a legitimate military target - so it is the timing of the attacks that is most relevant, rather than what was being fired at. They also specify that the attack must be targeting the military objects themselves 'so only weaponry reasonably necessary for that purpose can be used'.⁸³ The Trial Chamber appears to have looked more closely at what was actually being attacked, for example it considered the third floor of a hospital building being hit by 122m artillery and 40m anti-aircraft artillery to clearly not be aimed at any possible military target.⁸⁴

⁷⁸ *Galić* Trial Judgement, paragraph 509.

⁷⁹ *Galić* Appeal Judgement, paragraphs 336 to 351.

⁸⁰ *Galić* Appeal Judgement, paragraph 340.

⁸¹ *Galić* Trial Judgement, paragraph 509.

⁸² *Galić* Appeal Judgement, paragraph 340.

⁸³ *Galić* Appeal Judgement, paragraph 346.

⁸⁴ *Galić* Trial Judgement, paragraph 509.

In setting out the relevant law, the Appeals Chamber looks to the Fourth Geneva Convention, its two Additional Protocols and the ICRC Commentary.⁸⁵ It mentions that in addition, and specifically stating that it did not change the legal analysis, the parties had agreed to similar provisions in their agreement of 22 May.⁸⁶

The Appeals Chamber sets out the provisions of API and APII that specify that loss of protection for medical facilities in the circumstances under discussion is not instantaneous and a warning period is required while noting the equivalent effect of Article 19 of Geneva Convention (IV) in a footnote.⁸⁷ These provisions do not, however, seem to have had any effect on the actual findings of the judges who concentrate on the fact that there were attacks against the hospital that were clearly against the protected facility itself. It is interesting that the Appeals Judges felt it necessary to set out this law, again emphasising the role of the Additional Protocols in this area of law, although perhaps something of a missed chance to set out what an appropriate warning in this situation may have required.

Proportionality

The principle of 'proportionality' as it applies to the conduct of warfare is now considered one of the more certain principles of customary international law despite the complexities of actually putting it into practise. As late as 1997, however, Fenrick acknowledged that there was some debate about its existence.⁸⁸ Fenrick's view, however, was that debate as to its existence or otherwise was

... pointless as, whether or not proportionality is formally embedded in customary law, it is a logically necessary part of any decision-making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict.⁸⁹

The ICJ opinion in the Nuclear Weapons Case mentions a principle of proportionality only in its guise as a restriction on the right of states to act in self-defence.⁹⁰ Judge Higgins, in her

⁸⁵ *Galić* Appeal Judgement, paragraphs 340-346.

⁸⁶ *Galić* Appeal Judgement, paragraph 345.

⁸⁷ *Galić* Appeal Judgement at paragraph 344 which cites Additional Protocol I, art. 13(1); Additional Protocol II, Article 11(2).

⁸⁸ William J. Fenrick, 'Attacking the Enemy Civilian as a Punishable Offense', *Duke Journal of Comparative & International Law* 7 (1997): 545.

⁸⁹ Fenrick, 'Attacking the Enemy Civilian as a Punishable Offense', 545.

⁹⁰ Nuclear Weapons Advisory Opinion, paragraphs 41-42.

dissenting opinion, however, discusses the principle of proportionality in the IHL sense.⁹¹ To her there is no question of the existence of this principle ‘reflected in many provisions of Additional Protocol 1 to the Geneva Conventions of 1949’ and it means that ‘even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack’.⁹²

Fenrick goes on to point out that the principle is incorporated in API in the form of 51(5)(b) and 57(2)(a)(iii), although as he, Watkins and others have highlighted, the word ‘proportionality’ is not in fact used in API. The provisions of Articles 51(5)(b) and 57(2)(a)(iii) of AP I require instead an assessment of whether a loss of civilian life or damage to civilian property during the conduct of hostilities is ‘excessive in relation to the concrete and direct military advantage anticipated’.⁹³

By 2012, William H. Boothby wrote ‘There is clearly a customary rule of proportionality along the lines of that set out in API’. He goes on to point out that Rule 14 of the ICRC Customary Law Study sets out a customary rule in the exact terms of Article 51(5)(b) of API.⁹⁴ The Practice section of the ICRC’s Customary IHL Database includes mention of the ICTY jurisprudence referring to the principle of proportionality, including the *Galić* Trial and Appeal Judgements.⁹⁵

Although as a concept it is not difficult to understand, the application of the principle of proportionality is clearly more difficult. There are no agreed values or standards to allocate to civilian or military lives or to any military advantage to be gained. If any armed force has its own accepted examples or ratios, it is not something that they make public.⁹⁶ Michael Newton and Larry May highlight the importance of the context of a proportionality assessment – it is not just a case of comparing two values, it is a case of comparing two ‘incommensurables’ in the particular situation in which they are placed, together with an assessment of the probability of what is anticipated to result from a particular action.⁹⁷

⁹¹ Nuclear Weapons Advisory Opinion, Dissenting Opinion of Judge Higgins, paragraphs 19-22.

⁹² Nuclear Weapons Advisory Opinion, Dissenting Opinion of Judge Higgins, paragraph 20.

⁹³ Kenneth Watkins, ‘Assessing Proportionality: Moral Complexity and Legal Rules’, *Yearbook of International Humanitarian Law* 8 (2005): 4.

⁹⁴ William H. Boothby, *The Law of Targeting* (Oxford: Oxford University Press, 2012), 71.

⁹⁵ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14 (last accessed 18.09.2019)

⁹⁶ William J. Fenrick, ‘Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives’, *Windsor Yearbook of Access to Justice* 27, no. 2 (2009): 272-273.

⁹⁷ Michael Newton and Larry May, *Proportionality in International Law* (Oxford; New York: Oxford University Press, 2014), 17 and 24. See also Chapter 2 in general.

One of the most important elements of the three cases under investigation here was the fact that the judges, to varying degrees, did consider questions of proportionality in attack based on actual events. The judges' approach to proportionality is discussed in detail below.

The Trial Chamber in *Blaškić* use the concept of proportionality in relation to attacks four times in their judgment without giving any definition or source of the law they are applying. We are left to infer what they understand this term to mean and from where they derived it. For example, when they state:

By advocating the vigorous use of heavy weapons to seize villages inhabited mainly by civilians, General Blaškić gave orders which had consequences out of all proportion to military necessity and knew that many civilians would inevitably be killed and their homes destroyed.⁹⁸

this seems to be a reference to pre-API customary rules.

The *Galić* Trial Chamber explicitly considers the legal concept of proportionality in attack. Having defined the crime of 'attack on civilians',⁹⁹ they state i) that they agree with previous Trial Chambers that indiscriminate attacks may qualify as direct attacks against civilians,¹⁰⁰ and ii) that 'One type of indiscriminate attack violates the principle of proportionality'.¹⁰¹ The inclusion of disproportionate attacks as a subset of indiscriminate attacks follows the structure of Article 51 of API (and therefore the definition put forward by the Prosecution).

The authority cited for the discussion of proportionality at first glance looks fairly substantial, however, in effect it is a discussion of the provisions of Articles 51(5)(b) and 57(2)(a)(iii) and (b) API, Statements of Understanding made by state parties to API regarding these provisions and the associated ICRC Commentary (including mention of the travaux préparatoires). The exceptions to this are i) a mention that the principle of proportionality 'may be inferred, inter alia, from Articles 15 and 22 of the Lieber Code and from Article 24 of the 1924 Hague Air Warfare Rules',¹⁰² ii) one European Commission and Court of Human Rights case¹⁰³ and iii) military manuals from Canada, Australia and New Zealand (all parties to API) with a 'see also'

⁹⁸ *Blaškić* Trial Judgement, paragraph 651.

⁹⁹ *Galić* Trial Judgement, paragraph 56.

¹⁰⁰ *Galić* Trial Judgement, paragraph 57.

¹⁰¹ *Galić* Trial Judgement, paragraph 58.

¹⁰² *Galić* Trial Judgement, footnote 104.

¹⁰³ *Galić* Trial Judgement at footnote 105 refers to *Ergi v. Turkey* No. 23818/94, Decision on admissibility of 2 March 1995, Commission Report of 20 May 1997; *Ergi v. Turkey*, Judgement of 28 July 1998.

reference to the Yugoslav Regulation on the Application of international Laws of War in the Armed Forces of the SRFY, para. 72 (1988).¹⁰⁴

This reliance on Articles 51(5) and 57(2) API is interesting given that the Trial Chamber had already stated that their legal analysis of the crime of attacking civilians was based solely on the first sentence of Article 51(2) (as already mentioned above). They state in footnote 104 in relation to the principle of proportionality 'inferred, *inter alia*' from the Lieber Code and the 1924 Hague Air Warfare Rules that 'This principle was codified in Article 51(5)(b) and Article 57(2)(a)(iii) and (b) of Additional Protocol I'. The judges seem to be using the principle of proportionality as set out in these provisions of API (and in various states' interpretations of them) as a guide to what the modern principle of proportionality entails and requires in the absence of any detailed customary international law, having accepted that indiscriminate attacks including disproportionate attacks may constitute a direct attack against civilians.

The Trial Chamber concludes¹⁰⁵ that 'certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case by-case basis in light of the available evidence'. This approach can be criticised as conflating two different calculations in the minds of commanders. Ohlin goes further and argues that crimes of direct and indirect harm to civilians have been conflated by the ICTY through a broad definition of the required intention.¹⁰⁶ He states that

Consequently, a military commander who launches an attack, and foresees the possibility of civilian casualties, has thereby intentionally directed an attack against civilians... No analysis of proportionality is required because the attack was 'intentional' in the sense in which civil lawyers understand the concept.¹⁰⁷

Ohlin's argument does not, however, in fact do justice to the jurisprudence that has been created by the ICTY. There is no suggestion that if a military commander said that they had been targeting a particular military objective that their actions would not be judged by the sort of proportionality assessment envisaged in API. The type of 'indiscriminate' firing brought within the directly targeting civilians framework was a different matter, where no specific military objective could be discerned or where there was evidence (such as in the testimony described above) that those firing the guns simply did not care where they landed.

¹⁰⁴ *Galić* Trial Judgement, footnote 110.

¹⁰⁵ *Galić* Trial Judgement, paragraph 60.

¹⁰⁶ Ohlin, 'Targeting and the Concept of Intent', 79.

¹⁰⁷ Ohlin, 'Targeting and the Concept of Intent', 89.

That is not to say that the approach of the judges is beyond any critical appraisal. The discussion of the football tournament below sets out in more detail the approach taken by the Galić judges. The Gotovina trial judges saw that there was a proportionality calculation to be made in relation to the targeting of the military commander Milan Martić which is also discussed below. Otherwise in the case of Gotovina, if a military objective was identified as a potential intended target no further questions were asked of any shots that landed within 200m of the target which the trial judges had considered to give a reasonable margin for accuracy (this 200m distance and the criticism of it is discussed fully in Chapter 5 (Evidence II: Finding criminal intent)).

Given that the charges of attacks against civilians are ultimately subsumed under the 'crime of terror', the Trial Chamber's discussion of proportionality is not ultimately determinative of the crimes that Galić was found responsible for committing. It does, however, inform their consideration of the first scheduled shelling incident where many of those attending and watching a football tournament were killed or injured by two shells.

Shelling of football tournament

As Fenrick points out, although various military institutions and their legal advisors will presumably have 'developed a body of knowledge and opinions on targeting issues which has a substantial impact on targeting decisions',¹⁰⁸ there is no accepted formula for calculating the relative value of military and civilian lives or damage to military or civilian infrastructure, or even much knowledgeable public discussion of what a proportionate balance could or should be in any particular circumstance and even less relevant case law. This meant that the *Galić* Trial Judges had little guidance to look to when seeking to rely on a proportionality calculation. It also means that their findings here had the potential to be a significant precedent.

The Trial Chamber found that '[a]lthough the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in

¹⁰⁸ William J. Fenrick, 'Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives', *Windsor Yearbook of Access to Justice* 27, no. 2 (2009): 272.

relation to the direct and concrete military advantage anticipated.¹⁰⁹ On first look, this finding seems to be an extremely rare example of a proportionality calculation (apparently in accordance with Article 51(5)(b) API) being applied by a court to an actual set of facts. What this sentence does, however, is in fact sidestep a proportionality judgement based on the known figures and look to what the proportionality calculation would have been in the mind of the attacker, as is required by the law, but which leaves open what the actual calculation would have been or what the judges thought the attacker would have known and calculated (had the attacker in fact been considering the proportionality of their attack).

Rogier Bartels is of the view that it was unnecessary for the judges to make their proportionality observation. The SRK forces were unable to distinguish between civilians and soldiers at all because 1) 'they could not see the location that was being targeted' and 2) 'because of the means used' to target it; the group was therefore targeted as a whole and the attack was indiscriminate 'irrespective of the anticipated incidental damage'.¹¹⁰ The judges had in fact thought along these lines as they also stated that had 'the SRK forces launched two shells into a residential neighbourhood at random, without taking feasible precautions to verify the target of the attack, they would have unlawfully shelled a civilian area'.¹¹¹

What was, however, in the mind of the attacker here is not at all clear, given in particular that there was no evidence provided as to whether the attacker knew that something out of the ordinary was happening at the time they launched their attack. The judges note that 'there is no evidence on the Trial Record that suggests that the SRK was informed of the event taking place in the parking lot'.¹¹²

Given this, it seems that the judges' proportionality calculation statement was included to counter the argument that the attacker could have been firing the two shells at a legitimate military target, namely ABiH soldiers, and it was therefore not an attack against civilians. Going as far as carrying out a proportionality analysis therefore seems a way of making sure they are giving the defendant some benefit of the doubt in this situation - that is, working on the basis that the attackers knew that there was a concentration of soldiers and were attacking them, rather than civilians. The judges go on to say that 'had the SRK troops been informed of this

¹⁰⁹ *Galić* Trial Judgement, paragraph 387.

¹¹⁰ Rogier Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials', *Israel Law Review* 46, no. 2 (2013): 286.

¹¹¹ *Galić* Trial Judgement, paragraph 387.

¹¹² *Galić* Trial Judgement, paragraph 387.

gathering and of the presence of ABiH soldiers there, and had intended to target these soldiers, this attack would nevertheless be unlawful¹¹³ and therefore an example of indiscriminate shelling of a civilian area¹¹⁴ because it did not meet the requirements of proportionality.

There is something about the lack of knowledge of what the attacker knew and what potential calculation they could have made that is problematic here. The assessment is not made on the basis of the actual effects of the attack, but it is also not made on the basis of any actual knowledge of what the attacker knew or intended. The proportionality calculation is something for an attacker to consider in advance of the attack and to conclude at that point that it is not going to be 'an attack which may be expected to cause' disproportionate civilian harm and/or damage. If the attacker in this case knew there were soldiers present, what information did he have about the number of soldiers and number of civilians? The judges did not set out what percentage of these 200 people they were presuming the attacker to be considering to be soldiers for the purpose of this calculation. They may have had in mind the evidence they had heard that up to about half of the casualties were soldiers, although they made no specific finding on this point,¹¹⁵ and it would not have been relevant as such in any event to the calculation of what was in the mind of the attacker when launching the attack.

The judges also did not explain what military advantage would be anticipated from killing the enemy's soldiers in this situation. In a conflict where the advantage to the ABiH was in their greater troop numbers, they did not explain whether killing and wounding any number of their soldiers would be a direct and concrete military advantage or what then would be considered excessive harm to the civilian population. The question of what did in fact inform the judges' calculation is left open, perhaps intentionally so to avoid leaving hostages to future analysis by those further from the findings of fact. There is no mention of proportionality or 'excessive' incidental loss in the testimony of Ismet Hadžić, a resident of Dobrinja and former commander of the ABiH 5th Motorised Dobrinja Brigade (he considered there to be an approximately 50-50 proportion of civilians to military personnel who were casualties)¹¹⁶ nor in that of the international military who testified in relation to the football match shelling; Commandant John Hamill, a member of the Irish Defence Forces and a military observer for

¹¹³ *Galić Trial Judgement*, paragraph 387.

¹¹⁴ *Galić Trial Judgement*, paragraph 387.

¹¹⁵ Summarised in paragraph 386 of *Galić Trial Judgement*.

¹¹⁶ *Galić Trial Transcript*, 24 July 2002, page 12254.

UNPROFOR at the relevant time; Richard Higgs, an expert on mortars and formerly of the British Army; and Lieutenant-Colonel Christian Bergeron, a member of the Canadian Armed Forces, chef de cabinet of the commander of the Sarajevo Sector of UNPROFOR at the time relevant to his testimony.

Martić

The *Gotovina* Trial Judges considered the application of the principle of proportionality in relation to two attacks aimed at Milan Martić, the President of the Republic of Serbian Krajina and leader of the Army of the Republic of Serbian Krajina ('SVK') as the presiding member of the Supreme Defence Council of the Republic of Serbian Krajina,¹¹⁷ who was in Knin at the time of Operation Storm. There is, however, no explicit consideration of the legal definition of what constitutes 'proportionality' in attack within the judgement, only a footnote in which they state that their 'analysis in respect of the proportionality of the attack is informed by the relevant testimony of experts Konings and Corn and Additional Protocol I, Art. 51'.¹¹⁸ They do not go on to make any findings relating to the proportionality of the HV's use of artillery against other targets in Knin.¹¹⁹

¹¹⁷ *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, paragraphs 155, 156.

¹¹⁸ *Gotovina* Trial Judgement, Volume II, footnote 934.

¹¹⁹ *Gotovina* Trial Judgement, Volume II, footnote 935.

The footnotes leading up to this were as follows:

931 At this stage, the Trial Chamber considers primarily whether firing at the objects offered a definite military advantage and does not pronounce on the proportionality of these attacks in view of the risk of incidental loss of civilian life, injury to civilians, or damage to civilian objects.

932 The Trial Chamber notes that had these impacts which were at a distance of up to 700 metres from artillery targets been the result of the inaccuracy of the artillery weapons used, that would require a further consideration of whether such inaccurate weaponry can be used in the context of an artillery attack on specific targets within a town.

934 The Trial Chamber's analysis in respect of the proportionality of the attack is informed by the relevant testimony of experts Konings and Corn and Additional Protocol I, Art. 51.

935 The Trial Chamber has considered the targeting of the two locations where the HV believed Martić to have been present as an indicative example of a disproportionate attack during the shelling of Knin. The Trial Chamber does not pronounce on the proportionality of the HV's use of artillery against other targets in Knin on 4 and 5 August 1995.

Even expert witnesses are not there to inform the judges on the law, however, there is a strange overlap of law and facts in the Gotovina judges' discussions of the conduct of hostilities. Konings was by any measure an expert in the use of artillery by the Dutch and NATO. Within this, however, he was not an expert on IHL or ICL. Konings did not hold himself out to be an expert in the law, he seems to have been offered as an expert witness in targeting, able to say what those using artillery can and do consider, what the processes of target selection involve given the capabilities of the weaponry to hand. His discussion of what a military commander should have done in the situation of Knin tended to describe NATO practice, not minimum lawful practice. The defence expert Corn saw a confusion between rules of engagement (voluntarily adopted) and the binding law itself in Konings evidence.¹²⁰ Corn was the only witness selected for this research who specifically mentions the Additional Protocols to the Geneva Conventions in his testimony.

The expert witnesses Konings and Corn did not agree on the approach taken by Gotovina in attacking Knin. One of the main points of contention was Konings' view that artillery should not have been used against military objectives in civilian areas in the manner it had been due to the inherent risk to the civilian population, a position that tended to advocate for as many civilian casualties to be avoided as possible. Corn disagreed with this approach, as can be seen when he was asked to comment on Konings' statement that '[a]rtillery assets can only be used in case of the safe distance between the expected impacts and the civilian population is big enough to avoid casualties':

Well, once again I think I understood the general idea that he was trying to convey, but it was an imprecise and potentially dangerous imprecise articulation of the rule. What he essentially is saying is that you are only permitted to use artillery assets when you know that they will not cause civilian casualties. If that were it the rule in the Law on Armed Conflict we wouldn't have a proportionality rule. Because a proportionality rule is in effect an acknowledgement in the law that commanders conducting operations will inevitably have to make a judgement as to whether an attack that they know is probably going to cause civilian casualties may or may not be conducted. And that judgement is based on the assessment of the anticipated collateral damage or incidental injury and a comparison of that damage to the anticipated military advantage, and a determination as to whether or not that anticipated civilian harm will be excessive.¹²¹

During Leslie's testimony for the prosecution Leslie had made it clear that he did not think Gotovina's forces had the technological capability to hit pinpoint targets 'without a significant

¹²⁰ *Gotovina Trial Testimony*, 7 September 2009, pages 21165-21170.

¹²¹ *Gotovina Trial Testimony*, 7 September 2009, pages 21163-21164.

risk of collateral damage'. Gotovina's defence's questioning on this point led Judge Orie to intervene:

JUDGE ORIE: Mr. Kehoe, let's -- I let you go for a while and I do not mind if you think it's of great importance to analyse what happened in attacks by other armed forces elsewhere in the world, but I'd very much like to focus on this case.

One of the problems is that if you're talking about attacks by the armed forces of country X against a city in country Y, that would first have to receive all the information relevant for that and then we could only further make sensible use of this information, but not in general terms. Some of the questions, of course, whether if collateral damage occurs, whether that's always wrong, I think that we have sufficient case law already alone in this Tribunal that collateral damage should be avoided by the weaponry you choose, et cetera, et cetera, but these kind of sweeping statements, and that's of course the problems with your questions at this moment is that they are of a very nature, whereas usually decisions to be taken depend on five, six, seven, ten, fifteen relevant aspects of the situation we're dealing with.

Therefore, again, the monocausal sweeping statement approach does not always assist the Chamber.¹²²

From this it can be seen that Judge Orie clearly understands that collateral damage is a complicated matter but that also the approach of the defence questioning at this point is not assisting the chamber, tending towards generalities and not specific to the situation in question.

Having decided that Martić's residence constituted a 'military target' given his position within the RSK and SVK and that 'firing at his residence could disrupt his ability to move, communicate, and command and so offered a definite military advantage',¹²³ the judges go on to hold that firing on Martić's apartment and 'the area marked R on P2337' was, however, collectively (the judges did not consider the two locations separately for the purpose of their actual finding)¹²⁴ a disproportionate attack.¹²⁵

The judges' exact words were 'The Trial Chamber considers that this risk [a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects] was excessive in relation to the anticipated military advantage of firing at the two locations where

¹²² *Gotovina* Trial Transcript, 24 April 2008, page 2167.

¹²³ *Gotovina* Trial Judgement, paragraph 1899.

¹²⁴ The relevant part of paragraph 1910 states 'The Trial Chamber considers that this risk was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martić to have been present.⁹³⁴ This disproportionate attack shows that the HV paid little or no regard to the risk of civilian casualties and injuries and damage to civilian objects when firing artillery at a military target on at least three occasions on 4 August 1995'.

¹²⁵ *Gotovina* Trial Judgement, paragraph 1910.

the HV believed Martić to have been present',¹²⁶ clearly using concepts from Article 51(5)(b) API, although not its exact phrasing. They have omitted the words 'concrete and direct' in relation to military advantage. The use of the word 'risk' is also interesting. They did not use the term 'may be expected to cause' as in Article 51(5)(b) instead referring to a 'significant risk of'. Do these terms have the same meaning? In any event it seems strange that they could not use the exact phrasing of Article 51(5)(b) given that they have said they are specifically relying on Article 51.

The factors that are stated to have led to this decision set out in the key paragraph 1910 can be summarised as follows:

1. number and type of shells fired, their accuracy (including distance they were fired from) and effects;
2. the type of military advantage offered: i.e. that firing at Martić's apartment could disrupt his ability to move, communicate, and command with only a slight chance of hitting or injuring Martić;
3. the location of the target: i.e. his apartment was 'in an otherwise civilian apartment building' and 'both the apartment and the area marked R on P2337 were in otherwise predominantly civilian residential areas';
4. times of firing: when 'civilians could have reasonably been expected to be present on the streets of Knin near Martić's apartment and in the area marked R on P2337'; and therefore
5. 'a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects '.

As mentioned above the judges state in a footnote to this paragraph 1910 that their 'analysis in respect of the proportionality of the attack is informed by the relevant testimony of experts Konings and Corn and Additional Protocol I, Art. 51'.¹²⁷ As is typical with this judgement, there are no specific references at this point to where the information relied upon can be found. It is up to the reader to examine the rest of the judgement to see where these points were previously discussed.

¹²⁶ *Gotovina* Trial Judgement, paragraph 1910.

¹²⁷ *Gotovina* Trial Judgement, Volume II, footnote 934.

Much earlier in the judgement, the judges set out a summary of the evidence Konings and Corn provided (both in person and in their expert reports) in relation to the use of artillery.¹²⁸ This seems to be a factual findings section, but does in fact also, although not explicitly, provide some of the most detailed legal consideration of the attacks, specifically in how the experts considered the relevant law applied to a commander's decisions relating to the use of artillery. An example of this is the use of Corn's evidence regarding a commander's decision as to whether to use rocket or cannon artillery (in itself arising out of questions regarding Rajcic's testimony on inappropriateness of use of multiple barrel rocket launchers (MBRLs) to attack Martić's residence) where, as well as stating that the commander is obliged to assess the anticipated collateral damage and incidental injury, Corn also sets out certain factors that would be taken into account.¹²⁹ Another example is Corn's evidence regarding the use of artillery observers in relation to assessing and mitigating potential collateral damage.¹³⁰

At paragraphs 1174 and 1175, the judges summarise some of the evidence provided by Konings and Corn relating to potential targets within Knin albeit on the basis of assumed facts (given the difference in view between prosecution and defence as to what the actual factual situation in Knin was). This included in relation to attacks aimed at Martić. The judges set out that Konings' evidence that the presence of the commander-in-chief 'could' make his residence

¹²⁸ In section 4.4, under the heading 4.4.2 'General considerations', from paragraph 1163 to 1175. Section 4.4 - crimes committed/ Unlawful attacks on civilians and civilian objects - seems to be section setting out evidence heard and facts found by judges but some mention of legal elements. Section 5 is legal findings. NB Section 4.4 Unlawful attacks on civilians and civilian objects is not mirrored in Section 5 - it comes under 5.8 Persecution; 5.8.1 Applicable law; 5.8.2 Legal findings instead.

¹²⁹ *Gotovina* Trial Judgement, paragraph 1166:

1166. ... Corn testified that any commander considering the use of rocket artillery in a civilian area is obliged to assess the anticipated collateral damage and incidental injury. Rocket artillery is not necessarily the most indiscriminate option of attack when compared to cannon artillery: the comparison depends on the location of the civilian population (indoors or outdoors), the timing of the attack, the protection afforded to civilians by hardened structures, and the potential comparative impact of cannon and rocket rounds. Depending on these factors, Corn considered it conceivable that a commander could make a good faith determination that rocket artillery is better suited to achieve the desired effect.

¹³⁰ *Gotovina* Trial Judgement, paragraph 1171:

1171.....Corn testified that artillery observers can be used to correct fire and better control the effects of the attack and mitigate the risk of collateral damage or incidental injury to civilians. However, observed indirect fire is not always an option: when firing artillery at long range, commanders might not be willing or able to place observers in close proximity to long range targets, especially in areas under significant enemy control. Unobserved indirect fire is based on intelligence indicating the location of proposed targets and indirect fire direction calculations. Thus commanders should engage in a proportionality analysis, considering the location of the target and possible collateral damage, to decide whether using artillery observers is the best operational decision.

a 'military target' and that the HV artillery attack would have had a suppressing effect on a commander in Knin (preventing him moving about freely) even if it was unlikely to have been able to kill him.¹³¹ They also set out Corn's view that Martić, as commander in chief, was a 'lawful military objective' and that 'although the probability of killing or disabling Martić by artillery attack was limited, if Gotovina believed Martić to be an important component in SVK decision-making, the potential operational advantage in disrupting the SVK command and control structure would be substantial'.¹³²

This finding has been criticised for failing to give a detailed consideration of the factors involved in making the decision to fire on Martić's location, including Martić's importance as a military objective, and for applying a proportionality principle using post-attack effects.¹³³ The Appeals Chamber criticised this decision but did not set out what the correct conclusion or means of reaching it should have been.¹³⁴

Conclusion

The judges in the three cases of *Blaškić*, *Galić* and *Gotovina* significantly developed the law of targeting through their findings as to the definitions of crimes of unlawful attack against civilians in international law (as a war crime and crime against humanity). In setting out the existence and definition of these crimes the judges of the ICTY could not rely on a simple reading of pre-existing texts and had to make a choice as to what would guide their decision (and law) making. In defining unlawful attacks, civilians and civilian populations, military objectives and the principle of proportionality the judges looked mainly to the 1977 Additional Protocols and ICRC Commentary thereon together with the guidance they had received from the testimony of expert witnesses and those with military experience.

¹³¹ *Gotovina* Trial Judgement, paragraph 1174.

¹³² *Gotovina* Trial Judgement, paragraph 1175.

¹³³ See, for example, Laurie R. Blank, 'Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law', Emory Public Law Research Paper No. 12-186 of 28 January 2012, 6-7. See also Rogier Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials', *Israel Law Review* 46, no. 2 (2013): 291-292 for a different perspective on the military significance of Martić.

¹³⁴ *Gotovina* Appeal Judgement, paragraph 82.

Launching an attack against civilians was not specifically included in the list of crimes over which the ICTY was to have jurisdiction.¹³⁵ The *Blaškić* Trial Judgement was therefore critical for the law of targeting. The trial judges did not provide the most detailed explanation of the law of war or always portray the firmest grasp of its provisions. What they did do, however, was confirm that the judges at the ICTY were willing to work with the OTP's initiative and find an offence of unlawfully attacking civilians to exist within the jurisdiction of the ICTY. This was a first step in incorporating the humanitarian developments in the law governing armed conflict that had taken place since the immediate aftermath of the Second World War into the work of the ICTY.

In these first steps the *Blaškić* Trial Judges considered what gave an individual protected status and what military objectives there could have been in the conflict that took place in the area of Central Bosnia under Blaškić's command. They were also willing to consider the application of concepts such as distinction and proportionality although without defining them. In the *Galić* Trial Judgement and *Blaškić* Appeal Judgement, the judges of the ICTY confirmed the primacy of the provisions found in API as regards unlawful attacks against civilians, restricting the role of provisions with 'military necessity' justifications. In doing this, the ICTY judges looked almost solely to the Additional Protocols and the accompanying ICRC guidance, finding that international criminal customary law reflected these provisions or vice versa. In *Gotovina* the judges again used definitions provided by API but also explicitly placed reliance on the testimony provided by their expert witnesses, in particular, in relation to the principle of proportionality.

What can be hidden looking back on what was achieved is that the use of the provisions of API as they related to the law on targeting was not the only possible route for the ICTY to take. Although they were given what was a potentially out of date instruction in Article 3 of the Statute, it was one the judges could have worked with and not elaborated on if they did not have the desire to do so. It is clear, however, that they and the OTP believed that to do justice for the victims of the crimes forming the basis of these cases required the use of the law reflected in API. This law had been designed to promote the protection of civilians in a balancing act of humanity and military necessity; but with more consideration of the role of civilians caught up in a conflict, more of a tilt to humanity, than had previously been seen in such treaties. The judges used the developments in international law that were the precursor

¹³⁵ See ICTY Statute and Report of the Secretary General.

to and accompanied the adoption of the 1977 Additional Protocols to set out a modern international criminal law that prioritised the protection of the civilian even in conduct of hostilities situations and, in this context, therefore gave prominence to the ICRC guidance and the application of the principle of humanity over that of military necessity.

The next chapter (Chapter 4 (Evidence I: The witnesses)) introduces the witnesses and their testimony that forms the basis of much of the analysis of the judges' assessment of the evidence in Chapter 5 (Evidence II: Finding criminal intent). It discusses the different types of witnesses and the rules governing their testimony as well as the evidence they provided in relation to matters of targeting. In doing this it introduces the themes of the value of military and civilian experience to the decisions made by the judges in relation to the evidence in the demarcation of the law of targeting.

Introduction

The witnesses who appeared before the ICTY were vital to the work of the institution; Patricia Wald, a former judge at the ICTY, describes witnesses as ‘the lifeblood of ICTY trials’.¹ Witness testimony, as for many other of the charges brought at the ICTY, was the main source of evidence for charges of unlawful targeting and therefore another key element in the framework of this study.

There is a fairly small body of literature regarding the witnesses at the ICTY. This literature includes that of studies that set out to try to understand how the process of testifying affects the witnesses.² Marie-Bénédicte Dembour and Emily Haslam, based on research into testimony given in the *Krstić* hearings, have questioned what role victim-witnesses in particular should have in a criminal trial of this nature. Dembour and Haslam specifically set out to ‘challenge the assumption that victim-witnesses’ testimonies are essential to war crimes trials’.³ Their findings suggested that the victim witnesses were being needlessly required to testify given that the evidence they gave was so far removed from demonstrating the command responsibility of Krstić.⁴ The thoughts and findings of Dembour and Haslam’s study of the transcripts of the *Krstić* case are considered in some detail in this chapter as it is one of very few to have considered the contribution that witnesses make to the findings of a case in any depth.

¹ Patricia M. Wald, ‘Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal’, *Yale Human Rights & Development Law Journal* 5, no.1 (2002): 219.

² See, for example, Kimi King, James Meernik and Melissa McKay, ‘Bearing Witness: The Impact of Testifying at War Crimes Tribunals’, Paper for delivery at the 2016 International Studies Association and Central and East European International Studies Association Joint International Conference in Ljubljana, Slovenia June 22-26 2016; Kimi King and James Meernik, *The Witness Experience: Testimony at the ICTY and its Impact* (New York: Cambridge University Press, 2017) – based on research made possible due to the involvement of the ICTY Victim and Witnesses Unit (See <http://www.icty.org/en/about/registry/witnesses/echoes-of-testimonies--a-unique-research-project> last accessed 02.05.2019) and Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005).

³ Marie-Bénédicte Dembour and Emily Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, *European Journal of International Law* 15, no. 1 (2004), 155.

⁴ Dembour and Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, 151-177.

In considering some of the questions facing those who wish to critique international criminal law, Michelle Farrell highlights the problem of the relationship between the critical academic and the victims with whom this law to a large degree is concerned. She admits to unease in her position underpinned by 'the very uncertainty of how to speak about the victims/the 'other' of international criminal law/the excluded/the (un)represented or the otherwise invested'.⁵ Although this study is not of the same critical school, the centrality of the witnesses has raised questions as to their representation within these pages. Although the research arises from the contents of an archive, it is still based on the testimony of people who have experienced and/or witnessed atrocity in its truest sense. Their voices, together with those of the judges and lawyers of the ICTY, formed the basis of this research. This research is intended to show, at the least, the fullest respect to those victims and witnesses of crimes whose testimonies have been analysed and otherwise included in the study while also appreciating that it has by no means found the answer to the question posed by Farrell.

This chapter introduces the witnesses whose testimony, alongside the analysis of the judgements, forms the backbone of this research. It is intended to lay the basis for the next chapter, Chapter 5 (Evidence II: Finding criminal intent) by setting out the procedural rules under which witness testimony was given and demonstrating the range of witness testimony analysed for the purposes of this study. In doing this it highlights some of the themes that arose from the research into the contents of the witness testimony and that are explored throughout this project. This chapter concludes with a brief consideration of the relationship between the judges and the witnesses in the courtroom; a sometimes awkward, but very human, series of interactions over the course of years of trial hearings. This relationship is key to the findings as to what in fact influenced the judges in their decision making as regards the law of targeting, be it the principle of humanity or otherwise.

The witnesses' evidence at the ICTY

A significant amount of witness evidence was presented relating to matters of targeting and the firing of artillery (mortars, guns, howitzers and rockets). The rules governing the manner in which this evidence was presented and therefore what could be produced before the judges is

⁵ Michelle Farrell, 'Complicity, Critique and I' in *Critical Approaches to International Criminal Law: An Introduction*, ed. Christine Schwöbel (Routledge, 2014), 96.

set out in this section which acts as an introduction to the testimony which underlies the transcripts which form the basis of this research.

There were two broad categories of witness who presented evidence to the judges, witnesses of fact and expert witnesses. The general flexibility of the RPE and the background of the witnesses who gave evidence in relation to targeting matters, however, meant that there was some blurring of the boundaries; professional soldiers presented as witnesses of fact were, for example, at times permitted to give their opinion (usually only permitted in the case of expert witnesses).

All the witnesses whose testimony was studied were further categorised for the purposes of this study into their civilian or military status at the time of the events they were testifying to. This further categorisation is discussed in the next section (The Witnesses presenting evidence relating to Firing of Artillery).

Live testimony and use of witness statements

As Robert Cryer summarises the position, ‘The use of witness evidence is beset by difficulties’, including questions of interpretation and translation as well as memory and credibility, but that does not mean it cannot be valuable evidence.⁶ The first version of the RPE provided that witnesses ‘shall, in principle, be heard directly by the Chambers.’⁷ There was, however, provision for a Chamber to order that the witness’ evidence be taken by means of a deposition if it was ‘not possible to secure the presence of a witness’.⁸

Some of the amendments made through the fifty revisions of the RPE over the life of the ICTY were directly related to attempts to speed up or secure witness testimony.⁹ By the time the *Galić* trial started, the initial rule that witnesses were ‘in principle’ to be heard directly by the Chamber was removed and there was provision for the submission of written evidence, on the condition that it was not intended to provide proof of ‘the acts and conduct of the accused as

⁶ Robert Cryer, ‘Witness Evidence before the International Criminal Tribunals’, *Law and Practice of International Courts and Tribunals* 2, no. 3 (2003), 438 and generally.

⁷ Rule 90(A).

⁸ Rule 90(A).

⁹ See <http://www.icty.org/en/documents/rules-procedure-evidence> (last accessed 11.03.2019) and Wald, ‘Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal’, 229-230.

charged in the indictment.¹⁰ There was also, for some time, and as was used in the *Galić* trial hearing, provision to take evidence via video link.¹¹

By the time the *Gotovina* case was being heard witness statements were being accepted as evidence of ‘acts and conduct of the accused as charged in the indictment’ on the conditions that:

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges; and
- (iii) the witness attests that the written statement or transcript accurately reflects that witness’ declaration and what the witness would say if examined.¹²

This provision is considerably less detailed than that providing for statements that do not go to the heart of the charges against the accused as its use is completely dependent on the witness being available for cross examination and therefore that the accused has their chance to challenge the witness’ evidence. In the *Gotovina* hearing, the majority of witness testimony examined for the purposes of this study proceeded along the lines of the witnesses confirming their statement and giving brief further information to the prosecutor during examination-in-chief before being cross examined by the defence teams.

The consequence of the greater use of witness statements was that the testimony provided in court provided less of a coherent narrative of the witnesses’ experience and became harder to follow among references to statements and documents. Short summaries of the evidence to be presented by each witness were being given just before the start of the testimony in order to give the public an idea of what the testimony was about – something that would not always be very clear without having read the statement in advance.¹³

The *Gotovina* Trial Judges specifically mentioned in their judgment that they ‘always took into account the witnesses’ credibility and reliability, which sometimes varied for different portions

¹⁰ Rule 92 *bis*.

¹¹ Rule 71 *bis*. Note also the short-lived Rule 94 *ter* on affidavit evidence – seen, for example, in Revision 16, but this had been removed by the time of *Galić*.

¹² Rule 92 *ter*.

¹³ See *Gotovina* Trial Transcript, 16 December 2008, page 13804 where Judge Orić explains this process to the witness.

of their evidence’.¹⁴ In this assessment of the credibility of the witness testimony, the judges stated that they considered the

- demeanour of witnesses;
- individual circumstances of a witness, including his or her possible involvement in the events and fear of self-incrimination, the witness’s relationship with any of the Accused, and whether the witness would have an underlying motive which could affect the witness’s credibility and reliability.
- internal consistency of each witness’s testimony and other features of his or her evidence, as well as whether there was corroborating or contradicting evidence.¹⁵

In answer to the question ‘What do you think in general – or, in particular, in the type of cases before the ICTY – of the value of live testimony compared to the submission of written statements in any form?’, Professor Ćinić (formerly a trial judge in the case of *Gotovina*) answered that although he could not judge in general:

In our case, we verified witness statements through video conferences in the courtroom and in leu. All testimonies were verified during cross-examination. I did not find that use of this methods would somehow create any prejudice for evaluation.

While pointing out that ‘all live testimony carries with it the possibility of distortion as to what really occurred’,¹⁶ Wald agrees that cross-examination is a critical tool in assessing the accuracy of evidence provided in witness testimony and witness statements:

Cross-examination of a live witness serves to sort out the accuracy of a written record of eyewitness testimony compiled years before trial as compared to current recollection of the same event.

....

Whatever the inherent difficulties of live witness testimony, additional inaccuracies brought about by the passage of time and confrontation with other sources are far more likely to be ferreted out in live cross-examined testimony than by a judge reading a written statement. Cross-examination, unavailable in the absence of live witness testimony, may be the most effective method of determining the value of that testimony.¹⁷

Dembour and Haslam ask, however, if the testimony of victim-witnesses (where testifying is putting them through a further ordeal) is really the only way that the facts of what they went

¹⁴ *Gotovina* Trial Judgement at paragraph 31.

¹⁵ *Gotovina* Trial Judgement at paragraph 31. Patricia Wald sets out some of the difficulties in actually carrying out this assessment in the context of the work of the ICTY in Wald, ‘Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal’, 235-238.

¹⁶ Wald, ‘Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal’, 226.

¹⁷ Wald, ‘Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal’, 228-229.

through can be established in cases such as that of *Krstić*.¹⁸ The extensive use of victim-witnesses seemed particularly problematic to them given the apparent lack of direct relevance of their testimony to the criminal responsibility of Krstić.¹⁹ The witnesses that Dembour and Haslam are discussing were those who provided testimony as to what had happened during the genocide carried out at Srebrenica but their evidence did not link this to Krstić's role in what happened. Given that the contents of such testimony was not often challenged by the defence they consider that more care should be taken as to whether such witnesses are required to testify and alternative means found to establish the facts of the crimes.

Following a short consideration of the role of expert witness evidence, this chapter will start to lay the foundations of the findings of this study (somewhat contrary to the findings of Dembour and Haslam in their research) that the testimony of civilian (including victim) witnesses was of significant use in proving charges of unlawful targeting. It will do this by describing the witnesses and some of what they contributed in their testimonies under the heading 'The Witnesses presenting evidence relating to Firing of Artillery'.

Expert witness evidence

In the *Blaškić* Trial Judgement there is no reference to the use of expert witnesses as such at all, although it does refer twice to certain witnesses as being 'military experts'.²⁰ Some witnesses were, however, referred to as expert witnesses in the hearings. This included witnesses as varied as the prosecution witness Munib Kajmovic offered as an expert in demographic changes in the Vitez Municipality and defence witness Slobodan Janković called as an expert in ballistics. In the *Galić* and *Gotovina* Trial Judgements there is, however, explicit use of expert witness evidence.

This increased prominence of expert witnesses was reflected in the development of the RPE. The original RPE had no specific provision for expert witness statements, reports or testimony although it did envisage that there would be expert witnesses; it mentions that expert witnesses are excluded from the general rule that witnesses that have not yet testified should

¹⁸ Dembour and Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 168.

¹⁹ Dembour and Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 168.

²⁰ *Blaškić* Trial Judgement, paragraphs 391 and 415.

not be present for the testimony of other witnesses.²¹ At the start of the *Blaškić* hearing this remained the position, however, a specific provision relating to expert witnesses was adopted before this hearing was completed and applied for the start of the *Galić* hearing.²²

This provision in Rule 94 *bis* provided a timeframe for the disclosure of expert statements to the opposite party (specifically not required in the case of the *Blaškić* witnesses)²³ and gave the possibility that a witness statement of the expert could be admitted into evidence without the expert having to testify in person – if the opposite party accepted their statement. By the time of the *Gotovina* hearing this rule had been amended to add reference to an expert statement ‘and/or report’ and that the opposing party had to indicate in advance if it challenged the qualifications of the witness or the relevance of all or parts of their statement and/or report.²⁴

Expert witnesses played a significant role in the *Galić* trial and are explicitly referred to in the *Galić* Trial Judgement. In the procedural history at the end of the *Galić* Trial Judgement, the judges have a specific section on Expert Witnesses. They set out that 16 expert witness statements were submitted by the parties of which 15 were admitted. They also set out that the parties in most cases challenged the qualification of the witness to act as an expert witness and all expert witnesses were cross-examined, that is none of their reports were accepted without challenge.²⁵

The *Gotovina* Trial Judges heard evidence from 14 expert witnesses.²⁶ In the *Gotovina* Trial Judgement, the judges explicitly set out their approach to the appraisal and use of expert evidence.²⁷ Based on this the judges in the *Gotovina* Trial Judgement appear to have gone a

²¹ Original RPE of 11 February 1994, Rule 90(C).

²² Rule 94 *bis* Testimony of Expert Witnesses adopted on 10 July 1998 in RPE Rev.13.

²³ See *Blaškić* Trial Transcript, 19 January 1998, page 5643.

²⁴ RPE Rev.41 of 28 February 2008.

²⁵ *Galić* Trial Judgement, paragraphs 792-794.

²⁶ *Gotovina* Trial Judgement, paragraph 23.

²⁷ *Gotovina* Trial Judgement, paragraphs 35 and 36:

35. In assessing and weighing the testimony of expert witnesses, the Trial Chamber considered factors such as the professional competence of the expert, the material at his disposal, the methodologies used, the credibility of the findings made in light of these factors and other evidence, the position or positions held by the expert, and the limits of the expertise of each witness.

36. On one occasion, the Trial Chamber was seised of a *Gotovina* Defence motion requesting it to issue an order precluding the Prosecution from introducing testimony through proposed Prosecution expert witness Konings on whether targets selected and hit during Operation

step further than the judges in the other cases examined here, explicitly stating that hearing what a particular expert considered to be a legitimate military objective 'may' help in their own decision making.²⁸ They also found, however, that they were not assisted by 'purely legal matters' in an expert's report.²⁹ This issue of 'legal matters' in expert reports was raised in *Gotovina* in particular in relation to the Expert Witness Corn who was of a different nature to other experts in these cases; he was a military lawyer and legal scholar, rather than purely a military expert. His contribution and the judges' use of it will be discussed in more detail in the next chapter (Chapter 5 (Evidence II: Finding criminal intent)).

The witnesses presenting evidence relating to firing of artillery

The witness evidence relied upon by the judges in relation to charges relating to the law on targeting ranged from victim witness evidence as to the circumstances surrounding the attack and their experience of it to expert testimony regarding the trajectory of artillery projectiles. The use of artillery here refers to any bombs or shells fired from mortars, guns, howitzers or rockets.

As set out in the Method section of Chapter 1 (Introduction), the testimony for investigation was selected based on the judges' reliance on it in relation to targeting matters. Not all

Storm were legitimate military targets. The Trial Chamber held that it is not bound by the conclusions of the expert. However, the opinion of the expert as to whether, and why, he considers a target to be a legitimate military objective, although ultimately to be determined by the Trial Chamber, may assist it in making decisions in relation to the criminal liability of the accused. In a decision regarding a Defence expert witness, the Trial Chamber held that parts of an expert report that dealt with purely legal matters are of no assistance to the Trial Chamber. However, the Trial Chamber found that other parts of the report would assist it in understanding matters at the intersection between the laws of war and technical aspects of the conduct of military operations. Although fully aware of where to draw the lines between these matters, the Trial Chamber admitted the expert report into evidence in its entirety, declining to attempt to disentangle and only admit the relevant parts of the report. On another occasion, the Trial Chamber held that there is no obligation under the Rules for the Defence to disclose to the Prosecution any information it provided to the expert, any communications between the expert and the Defence, or any draft reports circulated between the expert and the Defence. It further ruled that such matters could be explored with the expert in cross-examination, but also stated that the sources and methodology used for an expert report must be clearly indicated and accessible, so as to give the parties and the Trial Chamber the possibility to test or challenge the factual basis and the methodology relied upon, in order to assess the probative value of the report.

²⁸ *Gotovina* Trial Judgement, paragraph 36.

²⁹ *Gotovina* Trial Judgement, paragraph 36.

possible testimony could, however, be included due to time constraints. Witnesses relied on in relation to certain events were, therefore, selected as being representative and comparable across the cases. In the case of *Blaškić* this meant those witnesses testifying in relation to the attacks on Ahmići, Vitez and Stari Vitez and Zenica. In *Galić* it meant those testifying in relation to the First, Second and Fifth Scheduled Shelling incidents (the shelling of a football match being played in Dobrinja on 1 June 1993, of those queuing for water at a well in Dobrinja on 12 July 1993 and of Markale Market on 5 February 1994 respectively) and the shelling of Koševo Hospital throughout the indictment period. In *Gotovina* it was those testifying in relation to the shelling of Knin. Witnesses were also selected if they were relied on in relation to the establishment of the responsibility of the accused in general, separately from any particular incident.

Within NVivo cases were created for each witness so selected and certain attributes of that witness were recorded. These attributes were selected based on themes that had been considered before analysis started and that arose during analysis; namely whether the witness was a soldier or civilian or had previous military experience, whether they were from the Former Yugoslavia or not, who they were testifying for and whether they were an expert witness.

As mentioned in the Method section of Chapter 1 (Introduction), 148 witness cases have been created and each case has been provided with attributes to identify whether they were a soldier or civilian at the time of the incidents they described (and within this whether they were from the Former Yugoslavia or not), whether if they were not a soldier at that time they had previous military experience, who they were giving evidence for, in which case and whether they were an expert witness. Being from the Former Yugoslavia is a reference to being from any of the states that constituted the Socialist Federative Republic of Yugoslavia, although the witnesses forming part of this research tended to be from Bosnia and Herzegovina, Croatia or Serbia.

The witnesses referred to in the judgments in relation to the First, Second and Fifth Scheduled Shelling incidents in the case of *Galić* (the shelling of the football match, water queue and Markale Market) and the shelling of Knin in the case of *Gotovina* were also selected for further analysis and their case details reflected that they had testified in relation to these events. This enabled the production of the pie charts presented later in this chapter.

Role of civilian or military status of the witnesses

The witnesses giving evidence in relation to the 'targeting' charges varied enormously in their backgrounds and experiences. At the outset of this research I assumed that since witnesses with military experience would have more familiarity with questions of targeting they would (together with the experts) provide the majority of and the most technically useful evidence in relation to the relevant charges.

What quickly became apparent, however, was that those subjected to the effects of targeting were particularly knowledgeable, if not in a technical sense, in a sense of extensive experience of the situation that could be relied on. To demonstrate the role that civilian witnesses, more likely to be victim-witnesses, had in proving charges of unlawful targeting, each witness selected for in depth analysis was given a case within NVivo and allocated to one of the following categories:

- **Former Yugoslav State Civilian**
Those witnesses who were civilian nationals of any of the Former Yugoslav states.
- **International Civilian**
Those witnesses who were civilian nationals of any state outside the Former Yugoslavia. This included those brought in by international organisations in the role of a civilian police force.
- **Former Yugoslav State Civilian Defence/Protection**
Those witnesses who stated they were members of a civilian defence or protection unit based in any of the Former Yugoslav states. There was not always a clear line as to whether these units in fact carried out military activities, but the testimony of the witnesses was used to assess if they did in fact fall on the civilian side of the line.
- **Former Yugoslav State or non-state Military**
Those witnesses who were members of any military organisation based in any of the Former Yugoslav states.

- International Military

Those witnesses who were members of any military organisation originating outside the Former Yugoslav states. These were usually members of the armed forces of other countries working under the banner of the various UN or NATO forces in the Former Yugoslav states.

The charts in this section aim to demonstrate the scope of the witnesses (who all provided testimony in relation to targeting matters) and their evidence investigated by this study. It tries to give a sense of the type of evidence provided by these witnesses and the scale of the data analysed. This is done in the following charts:

Bar Chart 1 – Background (military or civilian status) of selected witnesses testifying in relation to targeting matters

Bar Chart 2 – Background (military or civilian status) of selected witnesses testifying in relation to targeting matters_divided by case

Bar Chart 3 – Evidence provided by witnesses as to civilian status of victims

Bar Chart 4 – Evidence provided by witnesses as to targeting of civilians

Bar Chart 5 – Evidence provided by witnesses as to political role of accused

Bar Chart 1 – Background (military or civilian status) of selected witnesses
testifying in relation to targeting matters

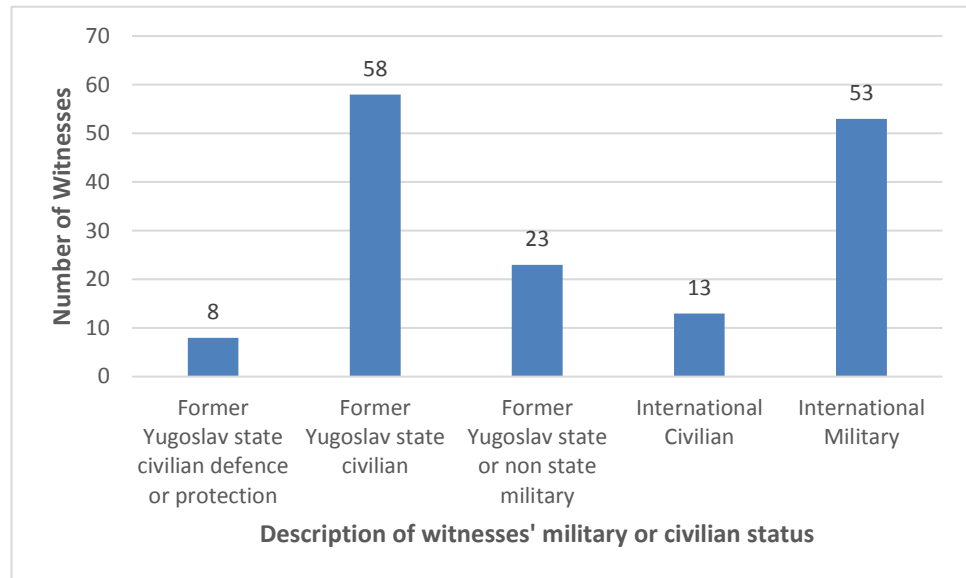


Chart 1 sets out the military or civilian status of all the witnesses who were selected for analysis in this study. It gives an idea, on a very general basis, of the witnesses relied on by the judges in relation to targeting matters. It is not, however, an empirical indication of greater reliance on one type of witness than another.

Some points to note about this chart are as follows:

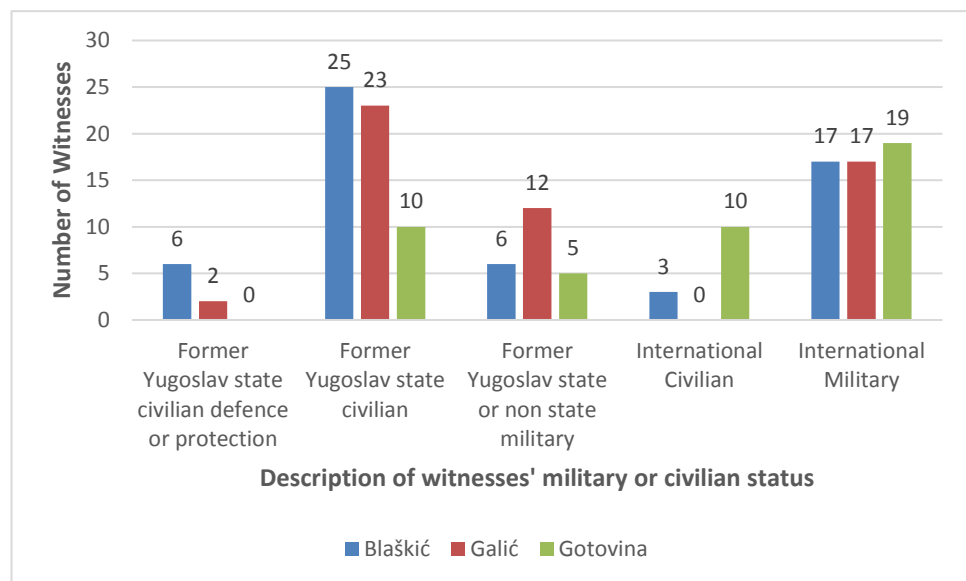
- The witnesses were selected on the basis that the judges had explicitly relied on their evidence in relation to targeting matters in selected sections of the judgements. It is possible that not all witnesses that were relied on were specifically mentioned by the judges. The selection process, although attempting to be thorough for the incidents selected did not cover all of the possible incidents/witnesses (due to time constraints) and is subjective as to what constituted 'relevant to targeting' and the relevance of each witness.
- It should also be noted that the line between the former Yugoslav state military and territorial or civilian defence was not always a distinct one. The witness' own

identification as military or non-military at the time of the events in question was used as the identifier in cases of any doubt.

- Although all the witnesses provided evidence in relation to matters relating to targeting, there is a wide range of activity that this covered, from evidence relating to the door-to-door massacre in Ahmići to the use of artillery around Sarajevo.

Despite these caveats, creating these distinctions between the witnesses permitted more direct comparisons between specific incidents which are utilised in Chapter 4 (Evidence I: The witnesses).

Bar Chart 2 – Background (military or civilian status) of selected witnesses
testifying in relation to targeting matters divided by case

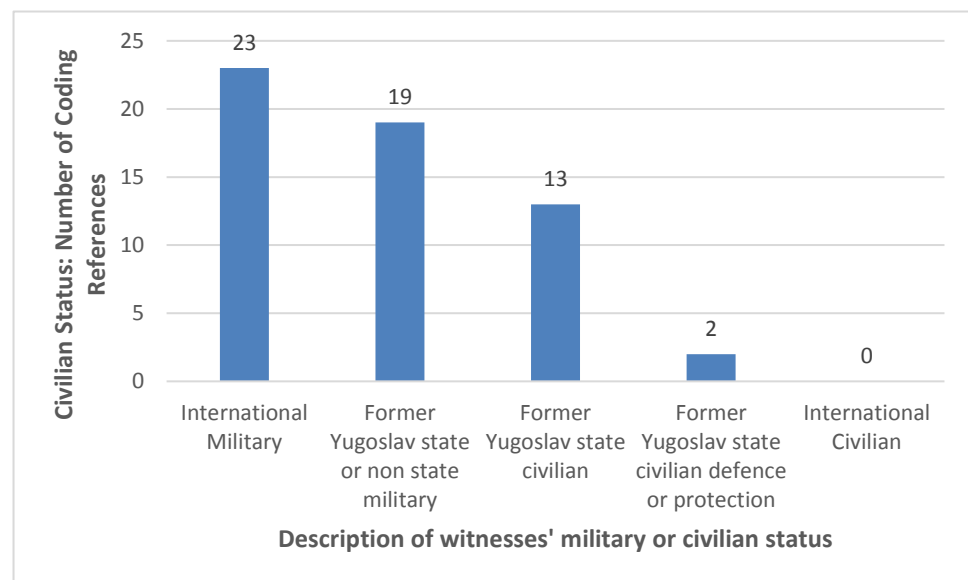


This chart contains the same information as Chart 1, however, it breaks down the military or civilian status of the witnesses by case to demonstrate the differences/similarities between the cases of those relied on by the judges in relation to targeting matters.

The same caveats apply for this chart as for Chart 1. It is not a comprehensive list of relevant witnesses. It is intended to be descriptive and not a quantitative measure.

It is interesting to note the increase in the number of international civilians relied on as witnesses in the case of *Gotovina*. This, combined with the relatively low number of former Yugoslav state civilians in particular, has the effect that the international contingent forms well over half of the witnesses in *Gotovina* whereas the proportion is in the opposite direction in the cases of *Galić* and *Blaškić*. This is the case even though the number of witnesses included from the international military is relatively constant across the cases.

Bar Chart 3 – Evidence provided by witnesses as to civilian status of victims

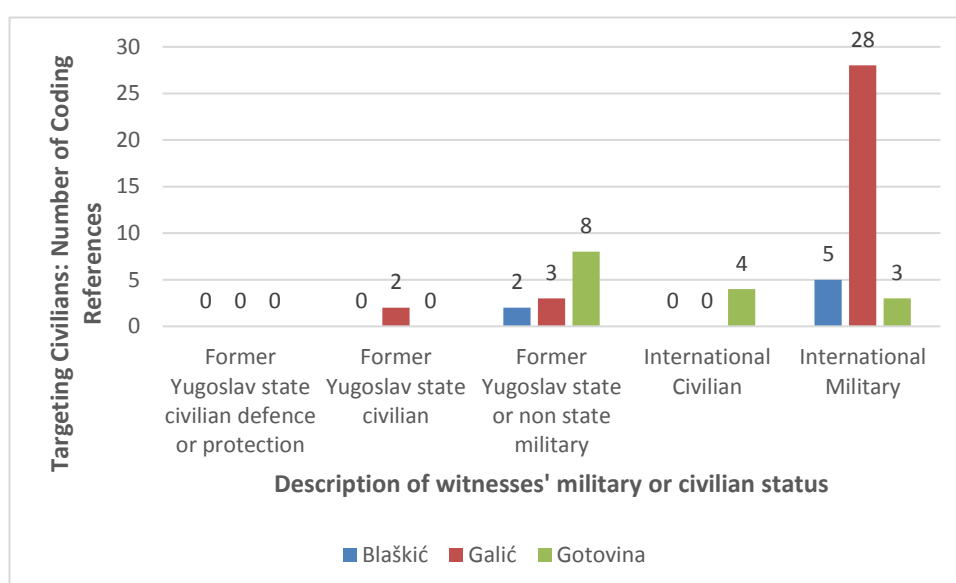


This chart demonstrates the sources of the evidence regarding the civilian status or otherwise of those who were harmed or potentially targeted in the incidents under consideration in this study. It shows the number of coding references manually coded for a mention or description of civilian status of those affected or targeted by an attack(s) broken down by military/civilian status of the witness source.

These coding references cover a range of matters relevant to establishing whether civilians were targeted as such. A civilian being killed or injured was not itself proof that they had been targeted as such, but the status of the victims killed or otherwise harmed and the areas destroyed was evidence that had to be interpreted by the judges to establish the intention

behind the shots fired.³⁰ The coding references included here vary from a simple answer to a question as to whether the people killed and injured were civilian or military or a description of the buildings and areas in a town subjected to artillery fire to the nature of a civilian protection organisation.³¹

Bar Chart 4 – Evidence provided by witnesses as to targeting of civilians



This chart shows the number of manually coded references that mentioned targeting of civilians broken down by military experience or otherwise of those referring to the direct targeting as well as the case in which they were testifying. These coding references can be distinguished from those of 'civilian status' by the fact that they were not simply evidence of who was killed or injured, or what was in fact civilian or military, but of an intention to harm civilians. This includes testimony of seeing the mortars fired to opinions of the overall objectives of military campaigns.³²

The chart demonstrates, by way of introduction to one of the themes that will be explored further in Chapter 5 (Evidence II: Finding criminal intent), that it was on the whole those with

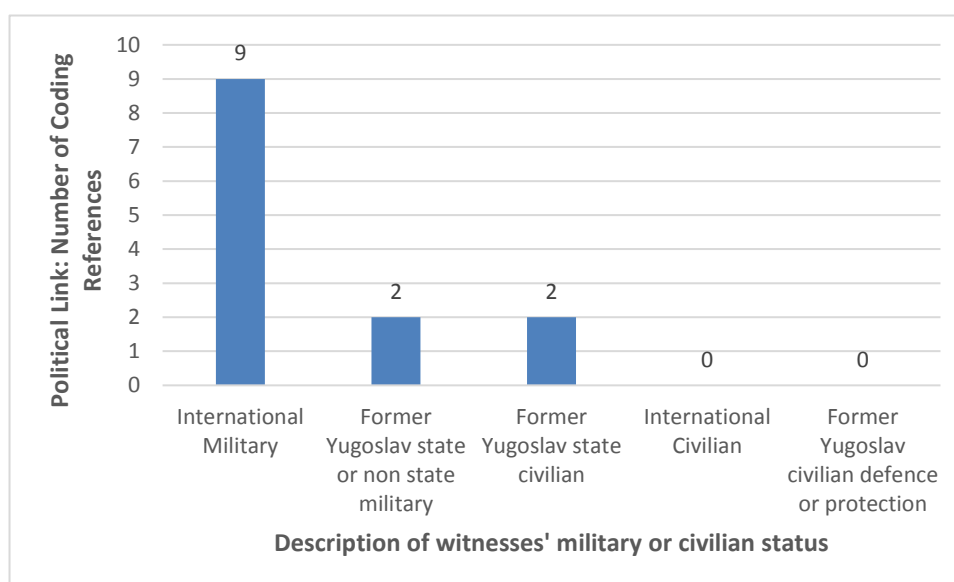
³⁰ See Chapter 3's section on Distinction for a detailed description of this principle.

³¹ *Galić* Trial Transcript, 22 March 2002, page 6016, *Gotovina* Trial Transcript, 14 May 2008, pages 2784-2790 and *Gotovina* Trial Transcript, 27 May 2008, page 3695.

³² *Galić* Trial Transcript, 16 May 2002, pages 8551-8552 and *Blaškić* Trial Transcript, 10 November 1997, page 3394.

military experience testified extensively as to the direct targeting of civilians. The terms picked up in the manual coding exercise which looked for specific mentions of civilians being targeted has not, however, picked up the extent to which the overall testimony showed civilians also demonstrating that they and other civilians were being targeted. Despite this, it has highlighted that it was in the case of *Galić* that there was the most input from civilians in this respect; the implications of this are picked up on in Chapter 5 (Evidence II: Finding criminal intent).

Bar Chart 5 – Evidence provided by witnesses as to political role of accused



One theme that emerged from coding the data was the role of the accused outside the purely military sphere, put here under the heading 'political role'. This is not so much to describe that the military men were also politicians, but their relationship to the broader ambitions of the political leaders of their communities, usually the desire for territorial gain by taking control from the 'others', which led to much of the criminal behaviour in the war (much of it carried out by military or paramilitary groups).

This subject was mainly coded within the judgments, however, it also was evident from the trial transcripts themselves. This chart shows the number of coding references manually coded in the trial transcripts to the political role of the accused again broken down by military/civilian status of the source witness. This coded testimony covers references from evidence of the

relationship of General Gotovina to a government minister close to the president of Croatia to evidence of the use in Galić's orders of derogatory terms for the opposition.³³ One of these references that was important to the judges in the *Galić* case was that of Patrick Henneberry, Senior UNMO and later UNPROFOR commander of the North LIMA side of Sarajevo from July 1992 to February 1993 who testified that Galić subscribed to the ultimate goal 'to either destroy the city or rid it of Muslims'.³⁴

The judges' views on the generals' agreement with, or enabling of, the broader political project seems to have played a role in their assessment of the intentions behind their direction to their subordinates on the use of artillery. How this evidence was translated into the judgments is considered in Chapter 6 (Responsibility).

Description of civilian or military background of witnesses relied on for specific incidents

The following pie charts give an indication of the different military or civilian status of the witnesses relied on in relation to three shelling incidents considered in detail in this thesis, the First Scheduled Shelling Incident (Football Match), Second Scheduled Shelling Incident (Water Queue) and Fifth Scheduled Shelling Incident (Markale Market). These can be contrasted with the chart for the witnesses who were relied on in relation to Knin (which has included all those relied on in both the factual/evidence and legal findings sections as representing a more accurate comparison with the witnesses compiled for the incidents in Sarajevo where there was no such distinction drawn).

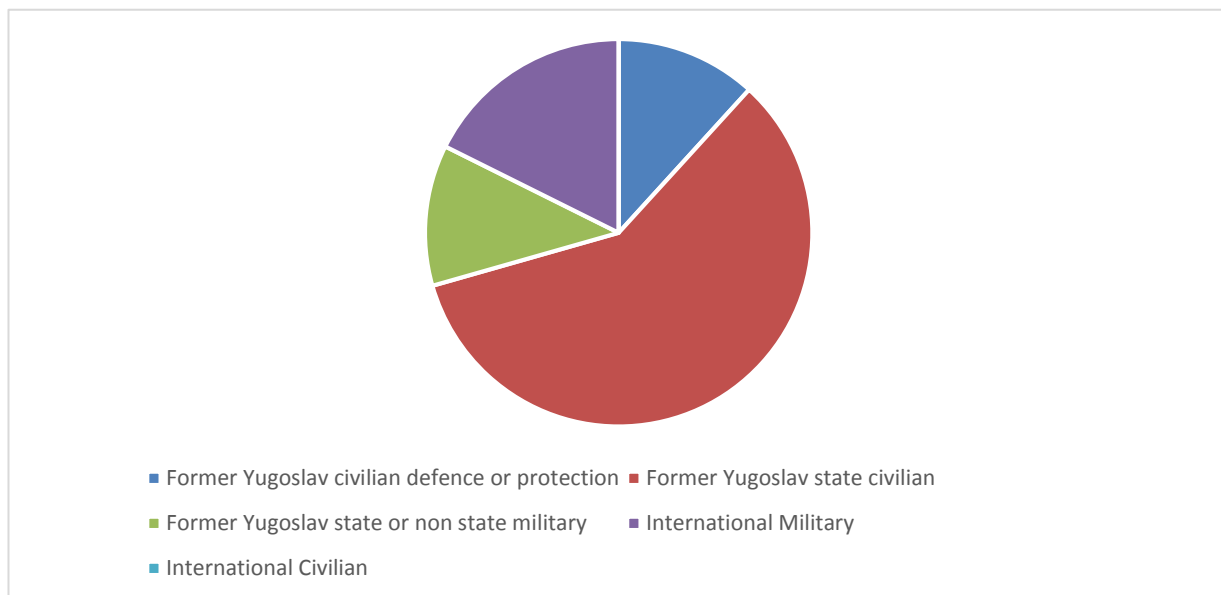
These charts were created by utilising the witness cases created in NVivo which already categorised the witnesses by their civilian or military status. Categories were added to the case descriptions to add whether the witness was relied on in relation to any of these incidents. The data which listed the witness, which incident(s) they had testified in relation to and their civilian or military status, was exported to Excel where these charts were produced from a simplification of the data into number of witnesses in each civilian/military category per incident. The charts are intended to be descriptive of the witnesses giving testimony regarding

³³ *Gotovina* Trial Transcript, 19 November 2009, page 24844-24845 and *Galić* Trial Transcript, 31 January 2003, page 18785.

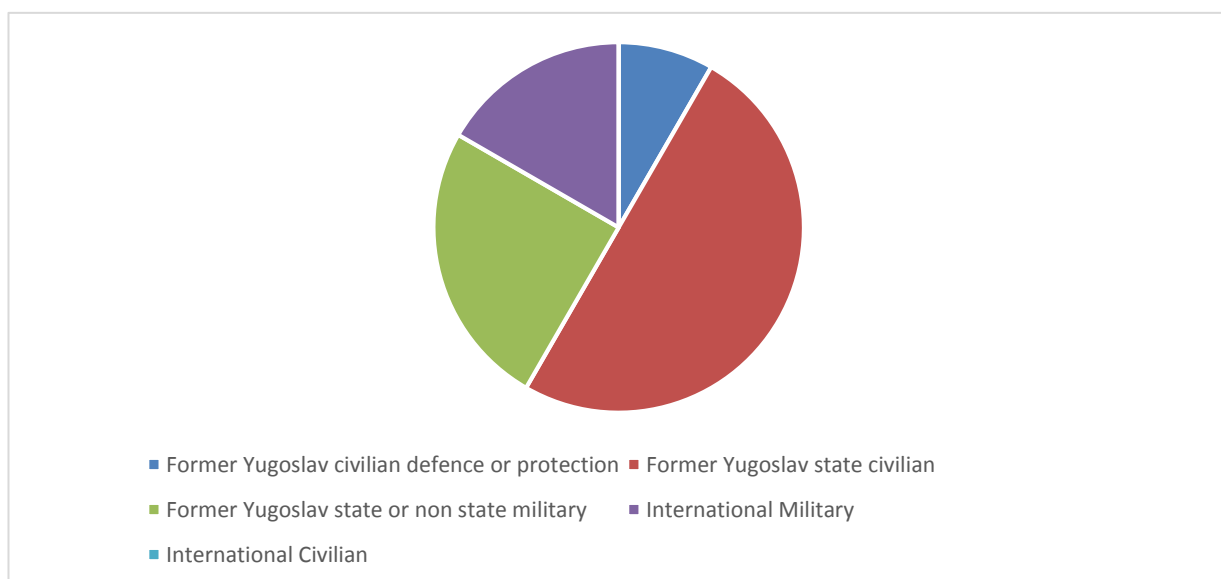
³⁴ *Galić* Trial Transcript, 21 May 2002, pages 8590-8591.

the incidents which were selected as being important in the decisions the judges made as to matters of targeting, not part of a quantitative analysis of the data.

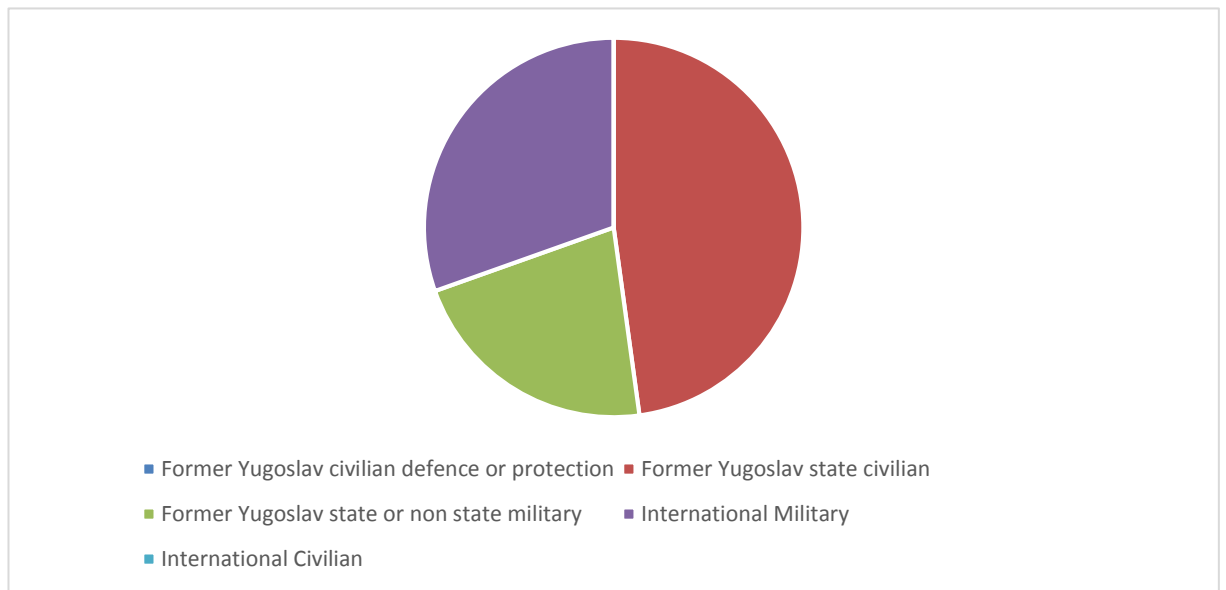
Pie Chart 1: Percentage of each type of witness for Galić First Scheduled Shelling Incident



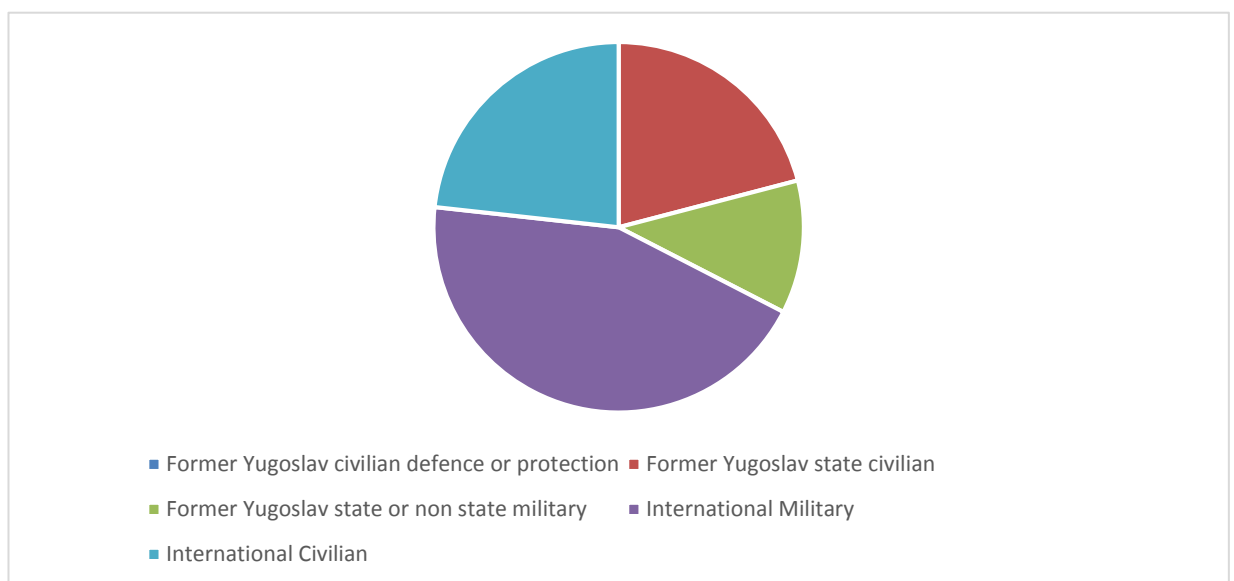
Pie Chart 2: Percentage of each type of witness for Galić Second Scheduled Shelling Incident



Pie Chart 3: Percentage of each type of witness for Galić Fifth Scheduled Shelling Incident



Pie Chart 4: Percentage of each type of witness for factual and legal findings in relation to Knin



There are clearly a higher percentage of civilian witnesses – and lower proportion of international military witnesses – relied on in relation to the *Galić* scheduled incidents than in relation to the shelling of Knin. In relation to Knin it is the international military who form the majority of the witnesses. These charts demonstrate that there was a larger role given to civilian witnesses in the *Galić* case and support the findings that will be set out in the next

chapter (Chapter 5 (Evidence II: Finding criminal intent)) of an important role for the evidence of the civilian witnesses in this case.

The judges and the witnesses

In all three cases under consideration for this study there were many witnesses called to give evidence over years' worth of testimony. Trying to keep the trials to schedule was a major challenge in itself for all those involved and perhaps where the judges had their most obvious managerial role, having, for example, to keep track of the time spent on examination and cross-examination of each witness.

The mandate of the ICTY and even just human nature and sympathy led to the victim witnesses being given a chance to tell their stories more fully than perhaps was completely relevant to the trial of the accused, although that was not always the case.³⁵ As former ICTY judge, Patricia Wald puts it:

‘The witness testimony in its graphic and heartrending detail is quite often riveting, and the judges want to hear it, especially when the rules do not prohibit it.’³⁶

Something that the Nuremberg IMT and the ICTY have in common is the judges’ reactions to individual testimony. Judge Wald’s comment above is in the same vein as Smith’s description that after the initial weeks of document heavy evidence, ‘only living witnesses could break through the haze and bring the courtroom back to life’³⁷ and of the judges’ ‘strong emotional response’ to the accounts of atrocities from the few victims called as witnesses.³⁸

Some of the judges at the ICTY have, however, been harshly criticised for the mode of their interactions with victim witnesses in the courtroom. No matter how well intentioned they were, some of the judges’ comments were simply insensitive, ‘patronizing and unhelpful’.³⁹

Judge Orie adopted a standard parting statement which appears in line with Dembour and Haslam’s suggestion that judges should ‘keep to their formal role’ and ‘keep their concluding

³⁵ Dembour and Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, 158.

³⁶ Wald, ‘Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal’, 233.

³⁷ Bradley F. Smith, *Reaching Judgment at Nuremberg* (London: Andre Deutsch, 1977), 88.

³⁸ Smith, *Reaching Judgment at Nuremberg*, 89.

³⁹ Dembour and Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, 175.

remarks short'.⁴⁰ Even he, however, was at times drawn into exchanges that clearly went beyond anything he was comfortable with. One example was at the end of the testimony of Ismet Fazlić who was injured by a shell in Sarajevo where, as Judge Orić finished his standard parting words, the witness asked if he could 'say something':

THE WITNESS: [Interpretation] You see, I'm a man who worked for 30 years honestly. I had everything. I was wounded, and I'm 70 per cent disabled. My wife was wounded 100 per cent, and my son 100 per cent. Three, three of us. And I'm in a wheelchair. Up to you to judge.

JUDGE ORIE: Of course, we noticed that you and your family are bearing consequences of the events at that time, and I think this Bench is fully aware.

THE WITNESS: [Interpretation] Not to blame. I'm not guilty. I didn't ask for the war. I didn't ask for the war. I didn't conduct the war. I didn't want it, nor did my family. I did an honest man's work, and I reached a point when I can't move around. Now why? Why? I'm not insulting anyone, because on the other side, there were similar incidents. I do apologise for saying this.

JUDGE ORIE: Mr. Fazlić, you expressed to us that as an honest man, you nevertheless became a victim of a war.

THE WITNESS: [Interpretation] I have all the documents, if you need them.

JUDGE ORIE: We don't need your documents, but don't think that this Court is not aware of what wars can create --

THE WITNESS: [Interpretation] Thank you all, and I had a lot of trouble to come here. Sarajevo, The Hague, you can imagine the transportation and everything, how hard it was for me, being an invalid.

JUDGE ORIE: Especially in your circumstances, I thank you once again very much for coming, and I wish you a safe trip home again. Thank you very much.

THE WITNESS: [Interpretation] Thank you, too. Thank you for working so well to punish those who are to blame. Thank you.⁴¹

The relationship between the judges and the witnesses can be seen as seeming particularly harsh when the judges intervene to keep the witness to answering the particular question asked, or in keeping their answers short due to the time limits imposed by the court itself, but it is in the relationships between those in the courtroom, mediated by the judge, where some of the motivations and, potentially, humanity, of those involved in the proceedings becomes most apparent from the transcribed record. The testimony of Ezrema Boskailo, for example, stands out for the effect it clearly had on many of those in the courtroom that day.

Ms Boskailo testified as to her experience of being injured in the Markale Market shelling incident, while she was four months pregnant and with another of her children in the marketplace at the time. The prosecution lawyer made a point of getting Ms Boskailo to state to the court why she had come to testify:

⁴⁰ Dembour and Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 173, 175.

⁴¹ *Galić* Trial Transcript, 4 April 2002, pages 6695-6697.

Q. Now, you felt compelled to come here to testify. Can you just tell us briefly why you have come.

A. I wouldn't be able to sleep otherwise. I have a moral obligation towards all the casualties whose bodies perhaps protected me and my unborn baby. And I often think of that. I wake up at night.

Q. And those casualties were the persons who stood between where you were and where the shell exploded?

A. Yes. Yes.

The interpreters, on being asked to stay on late replied:

We shall do it for the witness, Your Honour.

The first question the defence lawyer asked the witness (perhaps to clarify the extent of harm that was being defended or perhaps because someone was concerned) was

if there were any consequences of the injury and the incident on your third child.

Judge Orić gave a longer than usual parting statement:

JUDGE ORIE: Ms. Boskailo, this concludes your testimony in this Court. I think you'll now better understand why we tried to conclude it today and not let you wait for a couple of days and then return for just the last half hour. Because we are all aware that it's quite something for you. You explained to us why you came, and we do not underestimate what it means for witnesses to come from such a distance to tell this Court and to answer to the questions of the parties about those events that happened meanwhile many years ago, because it's important for this Court to hear from those who were present during these days, to hear what they have got to tell us answering the questions of both parties.

Therefore, I'd like to thank you very much, since it is important for the decisions we'll have to take. So I thank you very much, and I hope you have a safe trip home. And I, of course, hope that they will be able to arrange for your return to your family as soon as possible. Thank you very much for coming.⁴²

⁴² *Galić* Trial Transcript, 7 March 2002, pages 5055, 5057-5058, 5068-5069.

Judge Orić's standard parting was:

...you have answered all the questions put to you by both the Prosecution and the Defence and the additional questions of the Chamber. It is very important for this Chamber to hear the testimony of those who have been present during the relevant times at relevant places. It will assist us in performing our task. Since we also know that it is quite a journey for you to come from Sarajevo to The Hague, we would like to thank you very much for coming and I hope you have a safe journey home again.

(Taken from Testimony of Husein Grebić, *Galić* Trial Transcript, 16 April 2002, page 7308.)

The presiding judge, managing the work of the courtroom over several years, was called on to perform perhaps an impossible balancing act of their expected formal legal role and their own understanding of and compassion for the victim-witnesses. The traditional role of the presiding judge in ensuring a fair trial requires the appearance of impartiality – as well as impartiality itself – between the defence and prosecution; to give no sense of grievance to the prosecution, defendants or their representatives. This includes that the judges show a legal, rather than human, response.

Whatever criticisms are levelled against criminal trials for failing victims in the process, the judges at the ICTY were bound within a system that was only starting to consider how the voices of victims could best be represented, yet alone the victims compensated, when it was created.⁴³ Hearing the relevant testimony of the witnesses in a fair environment and giving it due weight in their judicial consideration was the technical limit of their role. Faced with the extremes of human nature and appeals to their own, Dembour and Haslam perhaps give the best description of the situation the judges are in when they say '[w]hatever it is, the hearing of victim-witnesses is not an objective operation.'⁴⁴ There are too many subjective factors and too many decisions, large and small, involved for it to be so.

Conclusion

This chapter has introduced the witnesses and some of the evidence they presented to the judges as it relates to matters of targeting. It is this evidence from the witnesses which formed, alongside the judgments themselves, the primary material for this study.

This chapter has set out the procedural rules applying to the presentation of evidence through witness testimony. These rules set out the categories of witnesses of fact and expert witnesses. Between the three judgements under review there were developments in the RPE which included a move away from a preference for full testimonies to a greater use of witness statements. There was also clearly some development in the use of expert witnesses as the RPE changed as to the mechanics of their contribution and, particularly in relation to questions

⁴³ See, for example, former ICTY and now ICC Judge, Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law* 44, No.s 1 and 2 (2011): 476-477.

⁴⁴ Dembour and Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 169.

of targeting, the judges became accustomed to utilising their expertise. In addition, although from a procedural and evidential viewpoint there was a technical distinction between witnesses of fact and expert witnesses, some of the military witnesses presented as witnesses of fact provided an expert appraisal based on their military experience; the judges willingly listened to such experience.

A further distinction was made for the purposes of this research between those with a military background and those without in order to compare the evidence given by each. Contrary to initial expectations it was evident that witnesses in both military and civilian groups gave evidence in relation to themes relevant to assessing questions of targeting; this included evidence of the civilian status of the victims, evidence that civilians had been targeted and even the connection of the accused to the broader political projects behind the conflicts.

In setting out the background of the witnesses the judges explicitly referred to in their judgments in relation to four different incidents arising from the cases of *Galić* and *Gotovina* it can be seen that there was a significant role for the evidence provided by civilians. In the case of *Galić* these were usually victim-witnesses, or at the least those who had lived through the conflict in Sarajevo. The next chapter, Chapter 5 (Evidence II: Finding criminal intent) considers the type of evidence these witnesses provided and argue that it was an important factor in their determinations in a way that Dembour and Haslam did not find; this is possibly because the facts regarding the shelling of Sarajevo were more contested than those in relation to the Srebrenica genocide and the witnesses' extensive experience could assist the judges in their evidential decision making endeavours.

This study has also considered whether within this framework, the judges and courtroom as a whole can be sensitive to the witnesses, often themselves victims, who appear before them. This does not always translate into the judges actually being able to help the witnesses but in their very inability to do so, while clearly wanting to, their 'humanity' is highlighted and may demonstrate where this humanity is likely to be translated into their judgements.

The next chapter (Chapter 5 (Evidence II: Finding criminal intent)) considers the evidential problems facing the judges in their implementation of the law of targeting; in their work assessing the lawful or unlawful nature of the attacks presented to them for their determination by the OTP. It assesses how the expert, military and civilian witness testimony

evidence was used by the judges. It also compares the situations in Sarajevo and Knin considered in the judgments of *Galić* and *Gotovina*. In doing this it considers the role of the principle of humanity and other potential factors acting on the judges in carrying out the evidential assessments necessary to demarcate the line between unlawful and lawful conduct of targeting.

Introduction

As with any criminal charge, whether or not crimes of ‘unlawful targeting’ were committed by the accused came down to an evidential assessment of what in fact had happened. In each case of determining whether or not an unlawful attack had taken place, the intended object of attack had to be established and this was not something that could simply be presumed from the locations on which the shots had landed.

The second element of the research question asked how the judges approached and decided on matters of evidence relevant to the law of targeting before them and what influences there were on how the judges did this, as well as whether the principle of humanity had a role here. Research into the judgments and trial transcripts of *Blaškić*, *Galić* and *Gotovina* to find evidence of how the judges carried out their evidential assessments, and what influenced them in doing so, forms the basis of this chapter.

This chapter contains the most significant analysis of information from the transcripts of the witnesses described in Chapter 4 (Evidence I: The Witnesses). Questions of the role of the principle of humanity and its relationship to the military viewpoint come to the forefront in considering how the judges arrived at their findings of fact based on such testimonies of those who experienced or were victims of artillery fire, whether they were civilian or not.

This chapter aims to demonstrate that in their work on assessing the evidence of the commission of crimes, the judges did not lose sight of the military viewpoint. This chapter also argues that within the judgments and trial transcripts a picture emerges of the importance of the evidence provided by civilian (including victim) witnesses.

Establishing the details of the applicable law in the cases before the ICTY may have been difficult and, in some cases, controversial. This process would, however, at its core have been something that the judges were familiar with. Establishing what the evidence they were provided with meant in applying this law to how weapons had been fired was, for most of the judges, probably something they had never faced before coming to the ICTY.

Given the nature of the crimes, it was not the accused pulling the trigger of any of the weapons used. This chapter considers how the judges assessed the evidence before them to find that crimes breaching the law of targeting had been committed by those under the command of the accused.

The standard to which the OTP had to prove their case was that they had to convince a majority of the judges in a Trial Chamber of the guilt of the accused ‘beyond reasonable doubt’.¹ Despite (or perhaps because of) relaxed rules relating to the admission of evidence in comparison to some national jurisdictions, there was a lot of debate around this area within the hearings. The *Blaškić* Trial Judges point out in their judgment that ‘the discussions between the parties as to how evidence was to be administered were generally animated and acrimonious’.²

The *Galić* Trial Judges included a section on ‘Evaluation of Evidence’ in which they state that ‘mindful that the burden of proof lies with the Prosecution, has evaluated the evidence adduced at trial in accordance with the Statute, the Rules, and accepted international standards and general principles of law’.³ In setting out how they assessed the evidence, the *Gotovina* Trial Judges stated that they did so in line with ‘the Statute, the Rules, and the jurisprudence of the Tribunal’ but where these sources did not provide the answers they ‘decided matters of evidence in such a way as would best favour a fair determination of the case in consonance with the spirit of the Statute and the general principles of law’.⁴ The *Galić* Trial Judges do not provide any further detail on what ‘accepted international standards’ would be, if any different from ‘general principles of law’.

The *Gotovina* Trial Judges included a specific paragraph on the ‘Standard of Proof’ which included that

.... each and every element of the offences charged against an accused must be proven beyond a reasonable doubt. This burden remains with the Prosecution throughout the trial. An accused must be acquitted if there is any reasonable explanation of the evidence other than the guilt of the accused.⁵

¹ Rule 87(A) RPE.

² *Blaškić* Trial Judgement, paragraph 36.

³ *Galić* Trial Judgement at paragraph 185.

⁴ *Gotovina* Trial Judgement at paragraph 30.

⁵ *Gotovina* Trial Judgement at paragraph 14.

This chapter starts by considering the nature of the evidence that was presented to the judges in relation to targeting related matters before going on to consider the judges' approach to this evidence. It then considers the different forms of witness evidence (expert, military and civilian) in some detail before concluding with a comparison between the approaches adopted to the charges relating to Sarajevo and Knin.

The problem of proving intention/effects-based assessments of targeting intentions

The specific focus of this research is on the act of targeting. From the view of considering the evidence this means looking at how it was established whether the guns, howitzers, rockets or mortars used in the conflict were intentionally used to direct fire at civilians or civilian populations or to fire indiscriminately. It is important to acknowledge that proving that civilians were killed or injured does not demonstrate by itself that they were being targeted or that weapons were being used indiscriminately. The judges had to use the proven facts to establish the intention of those firing the shot. This chapter seeks to demonstrate and evaluate how this intention was established by the judges from the evidence before them.

It is the knowledge and intention of those firing the shot in question which is key to whether or not a crime has been committed. The person (or crew) firing the gun, howitzer, rocket or mortar has (have) to 'wilfully' direct their attack against a civilian population or individual civilians not taking direct part in hostilities for this act to be criminal.⁶ A mistake or negligence in firing, even if civilians have been killed or injured, is not a criminal act.

The problem in the cases regarding targeting presented to the judges at the ICTY was that what the particular weapons had been fired at and why was the very heart of the case but where there was also very little evidence (what evidence there was will be described in this chapter). In some of the instances that the judges looked at it was at least clear as to whose troops had been firing the artillery and other weapons. In others, it was not. Even when the judges knew who fired the shot, however, the question of the intention behind each shot in question remained.

⁶ *Galić Trial Judgement*, paragraph 56.

How does a prosecution go about proving that a soldier firing a shot did so intending it to hit a civilian population or individual civilian? Very little, if anything, was known about those who physically fired any of the shots in question and therefore their potential motivations as individuals for doing so. There was not a written order from any of the accused clearly telling their subordinates to attack civilians presented in evidence. The nearest they got to this was an ambiguous order from Gotovina (discussed in detail in the next chapter (Responsibility)). There were no complete records of shots fired against the targets they were firing at presented in evidence.

In sum, in the absence of direct evidence of intention, what did the judges find did prove that there had been an intentional attack against civilians? To answer this, and establish what influences may have been apparent, an analysis of the trial judgments and witness testimony of certain of those witnesses referred to in the trial judgments was carried out with the following questions in mind:

- How did the judges establish what was targeted and by who?
- In particular, how did the judges establish an intention to target a particular location/population/civilian?
- What evidence was available and what was relied on/of most use to the judges?
- What were the problems the judges had to overcome in establishing facts beyond a reasonable doubt in evidential situations grounded in conflict?
- What experience of the witnesses seemed to be of most value?
- Did military or expert evidence have a particular impact?

The overall problem facing the judges could be described as how did they overcome an ‘effects based assessment’ of the legality of a particular action whose illegality depends on the intention of those who fired it as they did so; that very particularly provides that it is not the actual result that counts? This chapter examines the evidence provided by those with relevant experience and knowledge to see what was considered sufficient by the judges to prove such intention.

Approach to targeting evidence

This section sets out the general approaches taken by the judges to the evidence in each of the cases as demonstrated by the judgments themselves.

The judges considered what had happened during the hostilities in the Lašva Valley at the level of each village as well as looking at the broader picture of the conflict in each municipality. As mentioned earlier in this chapter and in Chapter 3 (Law), there is no discussion or explanation of how the charges of unlawful attacks against civilians as a war crime were considered in relation to the unlawful attack elements of the persecution charge.

As is perhaps apparent from their contents headings for sections B., C. and D. referring repeatedly in some way to an 'attack' and then the civilian and Muslim nature of those attacked, the judges seem to have considered the lawfulness of an attack within the framework of the persecution charge. As William Fenrick puts it, 'the unlawful attacks appear to have been regarded, essentially, as a component of persecution'.⁷ With this in mind, however, the judges were also seemingly assessing whether the attacks could be justified as being in accordance with the laws of war, and part of this was looking at the overall picture of the conflict and attacks, seeing patterns of unlawful and unjustifiable behaviour.

The reliance on the pattern of attack, that is recurring details in each of the separate attacks, is explicitly set out in relation to the villages in the municipality of Kiseljak under the heading 'The systematic and massive nature of the April and June 1993 attacks'.⁸ The judges come to similar conclusions as to Blaškić's responsibility based on the scale and manner of the atrocities (even, in the case of Busovača, in the absence of any physical evidence of orders from Blaškić)⁹ in relation to attacks carried out in the municipalities of Busovača and Kiseljak.¹⁰ In relation to Busovača they held:

...the Trial Chamber is convinced beyond all reasonable doubt that it followed from the scale of the atrocities carried out, from the scale of the assets used to achieve them and especially from the fact that the attacks were carried out at the same time and in the same way on the municipalities of Busovača, Vitez (particularly the villages of Ahmići, Nadioci, Pirići and Šantići) and Kiseljak (particularly the villages of Behrići, Gomionica, Gromiljak, Polje Višnjica, Rotilj and Višnjica) that General Blaškić had ordered the offensives against Loncari and Ocehnici.¹¹

⁷ William J. Fenrick, 'Commentary: A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the *Prosecutor V. Tihomir Blaškić*', *Leiden Journal of International Law* 13, no. 04 (2000): 946

⁸ *Blaškić* Trial Judgement, paragraph 624 onwards.

⁹ *Blaškić* Trial Judgement, paragraph 589.

¹⁰ *Blaškić* Trial Judgement, paragraphs 588-591 (Busovača) and 659 (Kiseljak).

¹¹ *Blaškić* Trial Judgement, paragraph 590.

In relation to Kiseljak they held that:

...the indubitable conclusion to be drawn from the manner in which the offensives progressed and the systematic and widespread nature of the crimes perpetrated is that the military operations of April and June 1993 were ordered at the highest level of the HVO military command by the Central Bosnia Operative Zone commander - General Blaškić. In this regard, the Trial Chamber will recall three striking points already brought out:

- the offensives conducted in April in the municipality of Vitez and to the north of Kiseljak and in June to the south of Kiseljak all evolved along similar lines;
- the attacks on Kiseljak were on each occasion led mostly by HVO troops, and more precisely by the Ban Jelašić Brigade whose commander received orders directly from the accused.
- and finally, the offensives all produced the same result: the systematic expulsion of Muslim civilian inhabitants from their villages and, in most cases, the destruction of their dwellings and the plunder of their property.¹²

The methods and patterns of the attacks are clearly important evidence to the judges. It is possible that this is an application of Rule 93 of the Rules of Procedure and Evidence that evidence of a 'consistent pattern of conduct relevant to serious violations of international humanitarian law' may be admitted in the interests of justice, although the rule itself is not mentioned in the *Blaškić* Trial Judgement.¹³ The only mention of the 'consistent pattern of conduct' in the *Blaškić* case occurs in the Appeal Judgement where it states:

521. The Appeals Chamber considers that the Trial Chamber drew a second inference: it inferred from the scale of atrocities, the scale of assets, and the manner in which the attacks and crimes were carried out, that the Appellant ordered the offensives in Lončari and Očehnici. It seems that the Trial Chamber had viewed these aspects as evincing a consistent pattern of conduct signifying the Appellant's responsibility. However, the Appeals Chamber considers that general assertions such as the "scale of atrocities" and the "scale of assets" are too broad and sweeping to give rise to an inference that the Appellant ordered the attacks in Lončari and Očehnici.

The Appeals Chamber did not disagree with the possibility of making an inference from a consistent pattern of conduct, but they did not agree that there was sufficient evidence to do so in this case. The indirect nature of the evidence as to the intentions of those carrying out the attacks, such as that referred to by the Appeals Chamber, leads to room for interpretation and disagreement as to the correct inference to be made. It also provides room for those with expertise to guide the judges' decision making as will be considered later in this chapter.

¹² *Blaškić* Trial Judgement, paragraph 659.

¹³ Full search of NVIVO database carried out on 9.12.2018 for term 'consistent pattern' and on 10.12.2018 for 'pattern of conduct'. The *Blaškić* Trial Judgement does refer to a 'pattern of conduct' in relation to proving the specific intent required for a conviction of genocide in footnote 485.

Galić

The use of a 'pattern of attack' in the broad sense is also a feature of the *Galić* case. Compared to the unlawful attack case against Gotovina, where shelling over two days was in question, the case against *Galić* used evidence of the patterns of shelling of Sarajevo over the course of nearly two years. The phrase is not used in the body of the *Galić* Trial Judgement itself, however, in the *Galić* Appeal Judgement the Appeals Chamber noted that

The Trial Chamber [*Galić* Trial Decision on Indictment Schedules, para. 23.] proposed that evidence regarding additional, unscheduled incidents could be introduced at trial pursuant to Rule 93 of the Rules in order to prove a consistent pattern of conduct relevant to the charges in the Indictment, including a campaign.⁶³¹ Use of this type of evidence has been endorsed by the Appeals Chamber in other cases.⁶³² In sum, the Trial Chamber properly used evidence regarding unscheduled incidents and the general situation in Sarajevo to support conclusions on the existence of a pattern of conduct: the campaign of shelling and sniping attacks against civilians.¹⁴

The *Galić* Trial Chamber also specifically refer twice to a 'pattern of conduct'

The overall evaluation of the evidence with regard to these two scheduled incidents 16 and 17, and of other strikingly similar events, indicating a pattern of conduct in the area, does not leave reasonable doubts as to the source of fire.¹⁵

and

'The evidence shows that the SRK attacked civilians, men and women, children and elderly in particular while engaged in typical civilian activities or where expected to be found, in a similar pattern of conduct throughout the city of Sarajevo.'¹⁶

The *Galić* judgment, at trial and appeal, shows the judges defining and applying the terms of the laws of war with more confidence and more fully than in previous judgements, probably because although they were charged alongside crimes against humanity, in this case it was the alleged war crime of the infliction of terror that was at the forefront, with no overarching persecution (as a crime against humanity) charge. The fact that these laws of war were at the forefront of the judges' minds can be seen in the factors set out in paragraph 188 as to what they had considered in assessing whether civilians had been targeted. These factors were:

¹⁴ *Galić* Appeal Judgement, paragraph 219.

¹⁵ *Galić* Trial Judgement, paragraph 432.

¹⁶ *Galić* Trial Judgement, paragraph 593.

- distance between the victim and the most probable source of fire;
- distance between the location where the victim was hit and the confrontation line;
- combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities;
- appearance of the victim as to age, gender, clothing;
- the activity the victim could appear to be engaged in; and
- visibility of the victim due to weather, unobstructed line of sight or daylight.

and the judges stated that these factors were used to see whether a scheduled incident was beyond reasonable doubt representative of the alleged campaign of sniping and shelling (as the shell or bullet was targeted at civilians); or

- whether it is reasonable to believe that the victim was hit by ABiH,
- by a stray bullet, or
- taken for a combatant.¹⁷

As well as considering the possibility that civilians were harmed by forces other than those under Galić's command, the judges were looking for the possibility of the deaths of civilians occurring through mistake – whether by a bullet simply going astray or a misidentification of a civilian as a combatant. From the factors they set out it appears the judges were also thinking about whether the civilians were in proximity to military objectives that could be legitimately targeted (albeit if in compliance with the principle of proportionality). It is not clear, however, where the judges got these factors set out in paragraph 188 from. There is no authority or reference given for these factors in paragraph 188. The judges also do not, at this point, make a reference to the distinction between mistake and recklessness; the latter would engender criminal responsibility whereas the former would not where bullets have gone astray or civilians been misidentified.

The evidence presented in the judgement to show deliberate targeting of civilians shows the variety of testimony provided to the court. For example, from paragraph 212, the judgement presents the overview evidence that civilians were being targeted by the SRK. The court, for

¹⁷ *Galić Trial Judgement*, paragraph 188.

example, cites two of Ashton's examples of firefighters coming under fire.¹⁸ The first described firefighters responding to fires caused by shelling being fired upon in turn, where there was a clear pause and resumption in the shelling – what is described as an intentional double tap attack on the responders. The second is more ambiguous in what it tells, with the shelling not stopping when the fire department responded to a fire in a bakery compound – perhaps it is that the bakery compound was coming under fire that is the most relevant point here.

In the next paragraph the judges refer to the targeting of ambulances and state that:

They were sometimes driven at night, without flashing their lights, and not on main roads to avoid being fired upon. Witness AD, an SRK soldier, testified that the Commander of the Ilijaš Brigade gave orders to his mortar battery to target ambulances, a marketplace, funeral processions, and cemeteries further north from the city, in Mrakovo.¹⁹

The first part of this evidence is that the ambulance drivers knew they were targets as they had to avoid being shot at. The second is the evidence of an SRK soldier that orders were given to his mortar battery to fire at ambulances, among other unlawful targets. The judges then return to evidence from international observers of other civilian activities being targeted.

It is strange that the evidence from Witness AD, directly stating that he was given orders to target ambulances, a marketplace, funeral processions and cemeteries, is almost hidden within less direct evidence of civilians being fired upon. This is first hand evidence that some SRK soldiers were ordered to fire at civilian targets. This leaves the link to be made from his commander giving these orders to these orders being passed down from Galić, but it is a necessary first step in showing that Galić gave such orders. There is real mixture of evidence cited here which perhaps demonstrates that the judges were willing to take into account the broad picture of the evidence in making their determinations as to what had happened as well as any demonstrable intention behind it.

Judge Nieto-Navia dissented in relation to 8 out of 23 scheduled sniping incidents, 3 out of 5 scheduled shelling incidents and certain unscheduled incidents (those in relation to Koševo Hospital).²⁰ The shelling incidents he dissented on were:

¹⁸ *Galić Trial Judgement*, paragraph 218.

¹⁹ *Galić Trial Judgement*, paragraph 219.

²⁰ *Galić Trial Judgement*, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, 5 December 2003 ('Nieto-Navia Partial Dissent'), paragraphs 17-102.

- Scheduled Shelling incident 1 (the football match), where he did not agree that the prosecution had proven that projectiles were fired deliberately or indiscriminately at civilians. He could not discount the 'significant ABiH presence' in and immediately around the parking lot as the reason for it being shelled.²¹
- Scheduled shelling incident 2 (the water queue of civilians in Dobrinja 'C5'), where he did not agree that there was sufficient proof that the projectile in question 'was deliberately fired from SRK-controlled territory with the intention of harming civilians'. There was again an ABiH military presence that he thought could have been the intended target.²²
- Scheduled shelling incident 5 (Markale market on 5 February 1994 was caused by a 120 millimetre mortar shell), where he was not satisfied that the evidence sufficiently demonstrated that the mortar had been fired from SRK controlled territory or 'deliberately aimed at Markale market'.²³

In relation to Koševo Hospital he noted the evidence of ABiH military activity around the hospital and that it was possible that it was this military activity that had been the target of the incoming fire.²⁴

The key to his dissent was the standard of proof. He thought that in these cases there was sufficient room for reasonable doubt to prevent a finding of guilt. Reading his dissent can give the feeling that the majority did, at the least, discount the scale of the ABiH presence in Sarajevo and the lack of distance between possible military objectives and the civilians living in the city. He also highlights that 'no witness appearing before the Trial Chamber saw those who fired the bullets or mortar shells responsible for the incidents discussed below and SRK soldiers repeatedly testified that they had not targeted civilians in ABiH-controlled territory deliberately'.²⁵

²¹ Nieto-Navia Partial Dissent, paragraphs 63-64.

²² Nieto-Navia Partial Dissent, paragraphs 66-70.

²³ Nieto-Navia Partial Dissent, paragraphs 71-101.

²⁴ Nieto-Navia Partial Dissent, paragraph 102.

²⁵ Nieto-Navia Partial Dissent, paragraph 18.

With so little direct evidence such as that of Witness AD, the *Galić* Trial Judges had no choice but to consider a wide range of indirect evidence. The factors that the *Galić* Trial Judges were considering in relation to each incident showed an understanding of the complexity involved in establishing the intention behind a shot from its effects. The level of disagreement from Judge Nieto-Navia as to what the evidence has in fact proven beyond reasonable doubt, however, again demonstrates the difficulties with the indirect evidence that formed the bulk of the evidence presented as to the actual intentions behind the strikes that killed and injured civilians. There was again, as for in the case of *Blaškić* and as will be seen, *Gotovina*, room for the judges to be guided by those with a particular expertise in the conduct of warfare.

Gotovina

The *Gotovina* Trial Judges set out in some detail how they had approached the evidence before them. They had perhaps some of the most relevant witnesses to the use of artillery by the accused's forces including, in particular, Marko Rajčić, the chief of artillery of the Split MD at the relevant time, however, they also faced the difficulties inherent in this, including problems of potential self-incrimination. The trial judges in *Gotovina* set out specifically that they

considered the individual circumstances of a witness, including his or her possible involvement in the events and fear of self-incrimination, the witness's relationship with any of the Accused, and whether the witness would have an underlying motive which could affect the witness's credibility and reliability.²⁶

What seems particularly striking between the *Gotovina* and *Galić* judgements is that the judges in *Gotovina* clearly set out the potential military objectives in Knin before going into details of the evidence as to where the artillery fire hit.²⁷ This is in addition to considering Rajčić's evidence as to what targets had been identified in advance.²⁸ The approach in *Galić* is the complete opposite, quite possibly because of the approach of the OTP in selecting scheduled incidents for the *Galić* case as well as the big difference in the size and complexity of Knin and Sarajevo and duration of the events under consideration. It may also be influenced by the fact that the Trial Chamber in *Gotovina* had at least some artillery lists and operational diaries.²⁹ A

²⁶ *Gotovina* Trial Judgement, paragraph 31.

²⁷ See *Gotovina* Trial Judgement, paragraphs 1195-1225.

²⁸ *Gotovina* Trial Judgement, paragraphs 1177-1194.

²⁹ See, for example, *Gotovina* Trial Judgement at paragraphs 1246-1267.

detailed comparison of the judges' findings in relation to the shelling of Knin and Sarajevo comprises the final section of this chapter.

The trial judges in *Gotovina* did not set out a comparable set of factors to those in *Galić* in relation to the shelling charges although they did set out a very general approach to the assessment of the shelling during Operation Storm:

The Trial Chamber has received and reviewed in chapter 4.4 above, evidence in relation to incidents of an alleged unlawful attack on civilian and civilian objects in Benkovac, Donji Lapac, Gračac, Knin, and Obrovac. In relation to each of these towns, the Trial Chamber has considered its findings on the HV's orders and artillery reports, if any, and compared them with its findings on the locations of artillery impacts, with a view to establishing what the HV targeted when firing its artillery during Operation Storm. To the same end, the Trial Chamber has considered the amounts of shells fired, the types of artillery weaponry used, and the manner in which they were used during the attacks. The Trial Chamber has evaluated this evidence in light of the expert testimony provided by witnesses Konings and Corn, including with regard to the accuracy of artillery weapons and the effects of artillery fire.³⁰

The *Gotovina* Trial Judges state at one point that they were 'necessarily cautious in drawing conclusions with regard to specific incidents based on any general impression'.³¹ This may indicate a different approach to that taken in *Galić* where significant evidence giving the 'general impression' was presented and discussed. The *Gotovina* Trial Judges also, under the heading 'General Considerations', set out in some detail the destructive capabilities, accuracy and varied potential uses of artillery, mortar and rocket systems weapons as described by the expert witnesses Corn and Konings and Andrew Leslie, a witness with significant military experience.³² The judges go on to summarise the expert evidence they received on the 'effects of using artillery against specific objects in Knin, including with regard to the anticipated military advantage and risk of collateral damage and incidental injury'.³³ Although the *Galić* Trial Judges had some evidence of this sort before them from the hearing, scattered through the testimony of the international military witnesses as well as their expert witnesses, they did not set it out in the judgement in the detail included in the *Gotovina* Trial Judgement. Within this section on general considerations, the *Gotovina* Trial Judges also set out the views of the expert witnesses on the interpretation of the orders before them.³⁴

³⁰ *Gotovina* Trial Judgement, paragraph 1892.

³¹ *Gotovina* Trial Judgement, paragraph 12.

³² *Gotovina* Trial Judgement, paragraphs 1163-1171.

³³ *Gotovina* Trial Judgement, paragraphs 1174-1175.

³⁴ *Gotovina* Trial Judgement, paragraphs 1172-1173.

Some more detailed guidance as to what the judges in *Gotovina* were looking for is given in relation to the towns for which they found there to be insufficient evidence with regard to artillery projectiles to consider the charges in any detail. They stated:

The evidence is insufficient for the Trial Chamber to determine the number of projectiles fired at these towns or, with only a few exceptions, to determine the times and locations of impacts of the projectiles. Moreover, the evidence insufficiently establishes whether there was an SVK presence in these towns or whether there were other objects offering a definite military advantage if fired at.³⁵

This at least points to the judges wanting to know:

- The number of projectiles fired, times and locations of impacts
- Was there a military presence or other military objectives?
- Was firing at these towns part of the military pre-planning of the HV

They go on to mention the lack of reference to these towns in the artillery orders and artillery reports that they have seen in evidence, saying:

The towns are not mentioned in the HV's artillery orders by Gotovina, Rajčić, Firšt, or Fuzul. The artillery reports which the Trial Chamber has received in evidence do not provide further details as to what the HV fired at in or nearby these towns. Under these circumstances, the Trial Chamber cannot determine what the forces firing artillery projectiles which impacted on or nearby the aforementioned towns targeted. The Trial Chamber does not consider an unlawful attack on civilians or civilian objects in these towns to be the only reasonable interpretation of the evidence. Instead, the Trial Chamber considers that the evidence allows for the reasonable interpretation that the forces who fired artillery projectiles which impacted on or nearby these towns were deliberately targeting military targets.³⁶

In rejecting a motion from Gotovina's Defence requesting the Trial Chamber to issue an order preventing the Prosecution from 'claiming that the Prosecution's fact witnesses are experts in artillery and thereby competent to tell the Trial Chamber whether particular targets were civilian or military', the Trial Chamber held that:

The determination of whether a specific target is civilian or military is ultimately one to be made by the Chamber. The Chamber considers that there is no need for an order preventing the Prosecution from describing their witnesses in any particular way, nor is there a need for an order preventing the Prosecution from eliciting opinions from fact witnesses.

³⁵ *Gotovina* Trial Judgement, paragraph 1162.

³⁶ *Gotovina* Trial Judgement, paragraph 1162.

That said, the Chamber reminds both parties that it is best assisted by a fact witness when that witness describes what he or she has personally observed, although certain testimonies do not always allow for a clear distinction between facts and conclusions.

If the testimony of a witness contains opinions or conclusions, the Chamber would expect the parties to explore the factual basis of the opinion or the conclusion. That would also be the proper time for the Defence to raise the matters brought up in the motion.

In this respect, the Chamber is aware that witnesses have different backgrounds and different professional experiences which enable them to observe, understand, and interpret observations in different ways.³⁷

This decision highlights the fundamental roles of witnesses as providers of fact and judges as the final arbiters of what those facts mean. They were, however, unwilling to be too restrictive, not letting a specific designation as an expert witness or not determine how they used the testimony given, seemingly willing to listen to expertise in the broader sense.

Two days later and in relation to the same witness, Andrew Leslie, the Trial Chamber again had to set out what information they thought it would be useful for them to hear from the witness. Leslie was a career artillery officer but the Defence were strongly contesting that he should be asked about the legality or otherwise of targeting certain buildings or areas in Knin given that he was not an expert witness and therefore that he was not there to give his opinion on these matters. Judge Orie stated that

I'm not seeking a long debate on what exactly is a legitimate target but about structures and about factual matters....Which a knowledgeable person could link with military targets, non-military targets, and whether legitimate or not, we will final be able to decide that.³⁸

Leslie was an interesting witness who the Defence were keen to keep from being asked too much as he was critical of the use of artillery against Knin. Although he was not an expert for the purposes of the trial he was an extremely senior military officer with extensive knowledge of the use of artillery by the Canadian armed forces. His view of the lack of targeting of specific targets in the initial phase of bombardment seems to have been accepted, or at the least cited at length, but his view that a shell landing within 400m of its target was the appropriate distance for a first shot was not.³⁹ Again, it was not at all clear why 400m was not accepted but

³⁷ *Gotovina* Trial Transcript, 22 April 2008, page 1928.

³⁸ *Gotovina* Trial Transcript, 24 April 2008, page 2131.

³⁹ *Gotovina* Trial Judgement, paragraphs 1278, 1898.

200m, with no apparent basis in the evidence, was applied. This 200m decision will be discussed in the next section 'Use of experts in relation to targeting matters'.

The next two sections consider the use of two different forms of expertise that were presented to the judges, that of 'expert witnesses' and that of the 'military witnesses'. They consider how the expertise of these witnesses may have guided the judges as to the factual conclusions as to intention to be drawn from the indirect evidence before them.

Use of experts in relation to targeting matters

Fenrick points out that it 'is occasionally suggested by military personnel that only those with combat experience can judge combat conduct or that only military courts are competent to evaluate military conduct'. His view is, however, that although '[d]ue regard must be paid to military factors, to the realities of combat, and to the opinions of military experts when prosecuting unlawful attack cases' the ICTY has shown that 'competent prosecution, defence and adjudication of unlawful attack cases is not beyond the practical competence of non-specialist tribunals'.⁴⁰

It is not unusual for judges to adjudicate on matters in which they have no particular expertise. Their skill is in being able to assess and utilise the expertise placed before them through the means of expert witnesses and expert reports. The jurisprudence of the ICTY is that expert evidence will be admitted if the expert witness 'can impartially offer specialised knowledge that will assist the chamber in understanding the evidence before it'.⁴¹

Fenrick has also noted that

As there is no established judicial hierarchy or rule of precedent in the international legal environment except within specific tribunals, if international judicial decisions are to have an impact beyond specific cases, they must persuade by their analysis of complex facts and the cogency of their legal reasoning.⁴²

⁴⁰ William J. Fenrick, 'The Prosecution of Unlawful Attack Cases before the ICTY', *Yearbook of International Humanitarian Law* 7 (2004): 189.

⁴¹ Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library Volume 3: International Criminal Procedure* (Cambridge: Cambridge University Press, 2011), 359.

⁴² William J. Fenrick, 'Gold Standard or Double Standard', Unpublished Article, 23

That is, if the judgements made by the ICTY relating to targeting are to have any broader relevance to IHL practitioners (in the military, governments or NGOs) or in future cases they must demonstrate that they are sound enough in their application of the law to the facts before them. The expert knowledge presented to them must have been incorporated in a persuasive manner. This section will consider the judges' approaches to certain key decisions where expert evidence had been presented to them.

Zenica

The *Blaškić* Trial Judgement does not mention the term 'expert witness' at all, although some witnesses, such as Professor Janković, discussed in this section, were described as such during the hearing.⁴³ The *Blaškić* Trial Judges' approach in finding that there was insufficient evidence to show that Zenica had in fact even been shelled by the HVO is a forerunner of the consideration of expert shelling evidence by the *Galić* Trial Chamber.

In seeking to prove that the HVO was responsible for shelling Zenica, the prosecution presented the sort of evidence that would become very familiar in the *Galić* trial, that is, crater analysis of the physical marks left by the shells to determine the calibre of the shell fired (and therefore its azimuth and range) and the likely direction of its source.⁴⁴ The prosecution used three witnesses to provide this evidence, namely Lars Baggesen, Mladen Veseljak and W.⁴⁵ Lars Baggesen was a major in the Danish army at the time of testifying and former ECMM monitor based in Zenica.⁴⁶ Mladen Veseljak was the on duty judge in Zenica called out to perform an initial investigation of the shelling of the city.⁴⁷ Witness W was a member of the ABiH with knowledge of the use of artillery and crater analysis who played a role in the crater investigation led by the Chief of Staff of the 303rd Brigade in Zenica.⁴⁸

The prosecution backed this technical analysis of the crater up with an analysis of the military context around Zenica at that time, namely that the shelling of Zenica could be explained as a response by the HVO to an ABiH counter-offensive and that the Bosnian Serb artillery could

⁴³ *Blaškić* Trial Transcript, 19 January 1999, pages 17231-17233. See also, for example, presentation of Witness Kajmovic as an expert, *Blaškić* Trial Transcript, 19 January 1998, pages 5642-5643.

⁴⁴ *Blaškić* Trial Judgement, paragraphs 668-670.

⁴⁵ *Blaškić* Trial Judgement, paragraphs 668-670.

⁴⁶ *Blaškić* Trial Transcript, 21 August 1997, pages 1858-1867.

⁴⁷ *Blaškić* Trial Transcript, 22 January 1998, pages 5932-5939.

⁴⁸ *Blaškić* Trial Transcript, 23 January 1998, pages 6011-6012.

not be responsible for it given the nature of their artillery assets and location at the time of the shelling.⁴⁹

The defence, among other arguments, used Professor Janković, an expert in flight mechanics, to counter the prosecution's technical evidence.⁵⁰ Using 'mathematical calculations made according to standardised models and using the hypothetical calculations put forward by the Prosecution', he had concluded 'that the two types of Russian and Yugoslav 122 mm howitzer likely to have been used in the acts could not have reached the centre of Zenica from the HVO positions west of the town because of their insufficient range'.⁵¹

It seems that the judges were impressed by the 'mathematical' and 'scientific' approach of Professor Janković's calculations and asked him to provide further evidence.⁵² They stated that

The Prosecution's demonstration relative to the calibre and trajectory of the shells used to shell Zenica town seemed insufficient when compared to that of the Defence.⁵³

The Trial Chamber seems to have found the prosecution's arguments on the military situation and reasoning more persuasive than their technical analysis, but even so they found that the evidence of the defence raised reasonable doubt against the proposition that the HVO was responsible for the shelling.⁵⁴

Experts and crater analysis of Markale Market shelling: Establishing source of fire

The presentation by the *Galić* Trial Chamber of their assessment of the shelling of the Markale Market on 5 February 1994 follows the same logic as used elsewhere in the judgement with the added complication that there were many more people involved in investigating this incident which had the highest profile of any in the case. It shows how the judges here approached complex technical evidence, including expert witness evidence.

⁴⁹ *Blaškić* Trial Judgement, paragraph 671.

⁵⁰ *Blaškić* Trial Judgement, paragraphs 672-675.

⁵¹ *Blaškić* Trial Judgement, paragraph 675.

⁵² *Blaškić* Trial Judgement, paragraph 677.

⁵³ *Blaškić* Trial Judgement, paragraph 677.

⁵⁴ *Blaškić* Trial Judgement, paragraph 677.

The judges were provided with technical evidence from non-expert witnesses as well as from expert witnesses. Expert witnesses in this sense mean experts designated as such for the purposes of the trial, the non-expert witnesses may also be experts in their field.

The judges considered the reports of the local investigative team, UN investigative teams and the defence experts then non-technical evidence concerning the source of fire. The most technical aspect of assessing from where the shell was fired arose from the relationship between the depth the tail fin reached in the ground and therefore the speed of the projectile on impact with the angle of descent of the projectile. This involved calculations of speed on firing, speed on impact, height differences between location of firing and location of impact and details of the composition of the ground. It is interesting to note that the *Galić* Trial Judges were willing to put a greater emphasis on crater impact analysis and believed it to be sufficiently 'scientific' in comparison to the *Blaškić* Trial Judges.

There is a problem raised here about the judges having the information they really need to hand, repeated in the *Gotovina* Trial Judgement. The majority were, however, of the view that they had given the defence the benefit of the doubt in all their calculations and were sure that the shell could only have been fired by the SRK:

489. This further consideration [an assessment of the best possible defence case on the known facts] assures the Majority that the experts' findings are buffered by a large margin of safety. There is no doubt that, given the characteristics of the remains of the explosion of the 120 mm mortar shell at Markale market, the shell could not have been fired from any place on the ABiH side of the confrontation lines in a direction north-northeast of Markale market.

Judge Nieto-Navia, however, breaks down what seemed like a well-reasoned conclusion by the judges based on what he considers to be insufficient evidence and too much uncertainty to reach the required standard of proof.⁵⁵ Despite this, the appeal judges upheld the majority's position. They found that given all the accepted and disputed evidence, the fundamental question was ultimately that of the angle of descent.⁵⁶

Despite finding 'certain shortcomings' the appeal judges would not reverse or revise the Trial Chamber's findings.⁵⁷ They concluded that

⁵⁵ Nieto-Navia Partial Dissent, paragraph 94.

⁵⁶ *Galić* Appeal Judgement, paragraphs 320-326.

⁵⁷ *Galić* Appeal Judgement, paragraphs 321, 325-326.

Neither the Trial Chamber's slight misreading of the UNPROFOR Report, nor its mildly confusing language render its decision unreasonable. Had the UNPROFOR report been the only evidence the Trial Chamber had to consider, an inaccurate analysis of the report may well have proved fatal, but an examination of the trial record shows that the Trial Chamber had much more evidence before it than simply the UNPROFOR report: it also had the Sablijca report; the Zečević report; the Viličić report, tendered by the Defence; and testimony from Bosnian experts, members of the UNPROFOR team, and Viličić.⁵⁸

In relation to the *Galić* Trial Chamber's decision to reject certain figures without a clear explanation, the Appeals Chamber held that

Of course, it might have been clearer had the Trial Chamber better explained why it disregarded Russell's conclusions, but a Trial Chamber does not have to explain every decision it makes, as long as the decision, having a view to the evidence, is reasonable.⁵⁹

This approach can be contrasted with that of the appeal judges in *Gotovina*. The *Galić* Appeal Judges looked at the trial record to see all the evidence the trial chamber had had before it and considered in total what the trial chamber had looked at to reach its decision. The *Gotovina* Appeals Chamber did not seem to do this and was criticised by Judge Agius for not considering 'the totality of the evidence'.⁶⁰

The Appeals Chamber in *Galić* did, however, decide that they had to rectify the Trial Chamber's findings in that the 'Trial Chamber was incorrect to find that the shell was deliberately aimed at Markale market, but correct to find that it was deliberately aimed at civilians'.⁶¹ This was based on the fact that the nearest military presence was found to be 300m away from the market and that Witness Hamill testified to the fact that an experienced mortar crew could get within 200 or 300m of their target on their first shot, so 'whether the SRK was aiming for the market itself or for some other target within the surrounding 300 m, it was aiming for a target within a civilian area, and this shelling incident was thus an example of shelling that deliberately targeted civilians'.⁶²

⁵⁸ *Galić* Appeal Judgement, paragraph 326.

⁵⁹ *Galić* Appeal Judgement, paragraph 328.

⁶⁰ *Gotovina* Appeal Judgement, Dissenting Opinion of Judge Carmel Agius, paragraph 3.

⁶¹ *Galić* Appeal Judgement, paragraph 335.

⁶² *Galić* Appeal Judgement, paragraph 335.

This does not seem entirely logical. On the basis of Hamill's view that an experienced mortar crew could, while in fact trying to hit it, land a first strike 300m from a military objective, it could be that those who fired the shot that landed 300m from the military objective were in fact targeting the military objective. An alternative interpretation might be that the area was overall a civilian one and not one that a shot should have been fired into at all. If there were military objectives near this civilian area, the law would require precautionary actions to be taken and proportionality calculations to be carried out before a decision was made to target it. It would not, if the principle of proportionality was met, however, prohibit any attack on the military objective. Despite all the expert and technical evidence produced in this case, there therefore remain questions of the exact intention behind the firing of the shell that hit Markale Market on 5 February 1994.

Use of experts in Gotovina: The use of a '200m rule' as a presumption of legality

The *Gotovina* Trial Judges expressly set out how they approached the testimony of expert witnesses. They stated:

In assessing and weighing the testimony of expert witnesses, the Trial Chamber considered factors such as the professional competence of the expert, the material at his disposal, the methodologies used, the credibility of the findings made in light of these factors and other evidence, the position or positions held by the expert, and the limits of the expertise of each witness.⁶³

They go on immediately to describe three further decisions they had made regarding expert evidence. The third is the most straightforward, setting out what the Prosecution were not entitled to know about the instructions and communications between the Defence and their expert, and included that 'the sources and methodology used for an expert report must be clearly indicated and accessible, so as to give the parties and the Trial Chamber the possibility to test or challenge the factual basis and the methodology relied upon, in order to assess the probative value of the report'.⁶⁴ This is a natural extension of the approach the judges indicated that they would take in the preceding paragraph.

The first and second relate to the substantive content of the expert reports and the boundaries of what the judges were looking for from the expert opinions.

⁶³ *Gotovina* Trial Judgement, paragraph 35.

⁶⁴ *Gotovina* Trial Judgement, paragraph 36.

The first finding was in relation to a Gotovina Defence motion requesting the court to prevent the Prosecution from using their expert witness Konings to testify as to whether 'targets selected and hit during Operation Storm were legitimate military targets'.⁶⁵ The judges held that they were

not bound by the conclusions of the expert. However, the opinion of the expert as to whether, and why, he considers a target to be a legitimate military objective, although ultimately to be determined by the Trial Chamber, may assist it in making decisions in relation to the criminal liability of the accused.⁶⁶

The second finding was that 'parts of an expert report that dealt with purely legal matters are of no assistance to the Trial Chamber'.⁶⁷ The judges found that the remaining parts of the report would, however, 'assist it in understanding matters at the intersection between the laws of war and technical aspects of the conduct of military operations'.⁶⁸ They pointed out that they were 'fully aware of where to draw the lines between these matters'.⁶⁹ Despite this second finding in particular, there seems to be a lot of 'law' contained in the judgement's summary of expert witness evidence, for example in relation to military targets and proportionality.⁷⁰

The testimony of expert witness Harry Konings was the Prosecution's key evidence in relation to the use of artillery in areas where civilians may be present. At the time of testifying Konings was a lieutenant-colonel in the Royal Netherlands Army working in their Land Forces Doctrine and Training Centre as a staff officer in Land Operations Doctrine.⁷¹ Konings was obviously very experienced and up to date in the application and development of practice in this area within the Netherlands armed forces and NATO. He had first-hand experience of the effects of artillery used in areas where civilians were present including, in particular, in Sarajevo. Despite it being clear that he did know a lot about what was and was not permitted by law, he did not come across in his testimony, however, as confident in his ability to discuss the legal regimes within which this practice took place.⁷²

⁶⁵ *Gotovina* Trial Judgement, paragraph 36.

⁶⁶ *Gotovina* Trial Judgement, paragraph 36.

⁶⁷ *Gotovina* Trial Judgement, paragraph 36.

⁶⁸ *Gotovina* Trial Judgement, paragraph 36.

⁶⁹ *Gotovina* Trial Judgement, paragraph 36.

⁷⁰ *Gotovina* Trial Judgement, paragraph 1163 onwards.

⁷¹ *Gotovina* Trial Transcript, 13 January 2009, page 14302.

⁷² See, for example, *Gotovina* Trial Transcript, 15 January 2009 and pages 14494-14495, in particular, where he mentions that he consulted a legal officer when drafting his expert report.

This lack of confidence was taken up by the defence expert witness Geoffrey Corn, a former senior military lawyer in the United States Army and, at the time of testifying, an associate professor of law at South Texas College of Law, who made the point that Konings was conflating restrictions imposed through choice in rules of engagement with those required by law. It was clear that Konings was talking about 'best practice', not what would be necessary to avoid committing criminal acts.

It is not clear how discussing NATO doctrine and practice was expected to be relevant to the charges against Gotovina. The basis on which it was being presented was never clearly stated although it could conceivably be because it would be based on the relevant international law. Corn, in contrast, explicitly draws upon API and the ICRC Commentary, especially towards the end of his testimony when discussing particular targets within Knin.⁷³

There was an intrinsic problem in the assessment of the shelling carried out as part of Operation Storm, as for the shelling of Sarajevo in Galić, in that no one knew what the intention for each shell as it was fired actually was – and could not tell from the damage it caused. The use of a '200m rule' in the *Gotovina* Trial Judgement was, however, a confusing development in the judgements at the ICTY. This section will discuss where it appeared, how it was used by the judges and the criticism that has been made of this approach.

A first, and important, point to note is that on close reading it is apparent that the shot landing within or without 200m from a particular location rule was not used by itself to establish the legality of the overall use of artillery. It was part of a layered appraisal of the use of artillery. This does not mean that its use is not a difficult concept to fit with the application of IHL, but it does make it more complicated to assess its place in the overall judgement and the reactions to it in the *Gotovina* Appeal Judgement and otherwise.

The first mention of a 200m range is among the judges' factual findings in relation to the alleged unlawful attack against civilians and civilian objects in Knin, in footnote 5359 which reads as follows:

In light of the evidence received from witnesses Konings, Corn, Rajčić and Leslie regarding the accuracy of the artillery weapons the HV had at its disposal during Operation Storm, the Trial Chamber has generally not further specified in its factual findings the locations of impacts within a 200 metre range of relevant objects.

⁷³ See, for example, *Gotovina* Trial Transcript, 11 September 2009, page 21581.

From here, the 200m distance criterion is in fact used in two stages, namely:

1. Using it to identify shots fired at (or presumed fired at) known targets (those on target lists and stated to have been fired at):

Paragraph 1898 of the Gotovina Trial Judgement contains a summary of expert and technical evidence as to the accuracy of the weapons used in the attack on Knin and factors that could affect this accuracy. This includes that:

According to Rajčić, the 130-millimetre cannon at a distance of 26 kilometres has an error range of about 15 metres along the axis, and about 70 to 75 metres in distance, with the normal scattering dispersion of a 130-millimetre shell being an area with a diameter of 35 metres. Both Konings and Rajčić testified that the BM-21 122-millimetre launcher generally covers a broader area than the 130-millimetre cannon.⁷⁴

This leads on to the judges' adoption of a presumption that projectiles landing within 200m of an 'identified artillery target' were in fact deliberately aimed at that target:

Evaluating all of this evidence, the Trial Chamber considers it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target were deliberately fired at that artillery target.⁷⁵

This is in effect a presumption of legality for the shells found to have landed within 200m of a military objective, the judges having carried out a separate assessment of whether the targets were lawful targets (that is, military objectives) according to IHL. It has also been taken to mean that it is a presumption of illegality for shells landing outside the 200m distance although, as will be seen in 2. below, there were further considerations that the judges took into account before declaring that the shells that had landed outside 200m were evidence of an unlawful attack.

In reaching their conclusion, the judges refer to the testimony of Konings, Rajčić and Leslie, although they in fact decided not to apply Leslie's opinion in this regard. Neither Konings, Rajčić nor any other witness as far as this study has found, however,

⁷⁴ *Gotovina* Trial Judgement, paragraph 1898.

⁷⁵ *Gotovina* Trial Judgement, paragraph 1898.

mentioned such a use of a 200m radius and it remains unclear how the '200m' rule arose.

It is possible that the judges chose 200m as granting a significant benefit of the doubt to anyone applying Rajčić's figures, having discounted Leslie's 400m figure as an outlier from those of Konings and Rajčić. It is not clear, however, why they would not have explicitly stated this.

It seems there was actually very little relevant information provided to the judges on the accuracy of the actual weapons that were utilised by Gotovina's forces. A question raised as part of this is whether Leslie's figure stated to be in relation to the 'first shot' was not directly comparable to the evidence that Rajčić and others provided, which may have been distances of margins of error for an 'acquired target'.⁷⁶

2. Consideration of shells landing outside the 200m mark

If a shell landed beyond 200m from 'the objects the HV identified as military targets and reported firing on' it was not presumed to have been fired at that target, but it was also not presumed to have been an unlawful shot.⁷⁷ The judges went on to carry out a further appraisal of these known impacts, considering whether they 'could have been the result of errors or inaccuracies'.⁷⁸ In doing this they state that they considered the testimony of Konings, Rajčić and Leslie 'on the accuracy of the HV's artillery weaponry at the range used on 4 and 5 August 1995 during the shelling of Knin'.⁷⁹ They specifically state that they considered:

- the distances of the impacts from identified artillery targets;
- the number of artillery projectiles that landing distances of 300-700 metres away from the identified artillery targets;
- the location of the impacts in relation to the general geography of Knin;

⁷⁶ An interesting and knowledgeable sounding comment from 'Peter' – tantalisingly with no further details of who they were or their experience on this matter – on an EJIL Talk article by Marko Milanovic 'The Gotovina Omnishambles' posted on 22.11.2012 <https://www.ejiltalk.org/the-gotovina-omnishambles/#more-6975> (last accessed 17.06.2019).

⁷⁷ *Gotovina Trial Judgement*, paragraph 1903.

⁷⁸ *Gotovina Trial Judgement*, paragraph 1906.

⁷⁹ *Gotovina Trial Judgement*, paragraph 1906.

- the fact that ‘on at least two occasions, the TS-4 reported firing at the general area of Knin or at Knin, without specifying an artillery target’.⁸⁰
- The lack of evidence of military objectives near these impact sites, finding ‘no evidence indicating any fixed SVK or police presence in or near the aforementioned areas, nor evidence otherwise indicating that firing at these areas would offer a definite military advantage....’.⁸¹

They concluded that:

....too many projectiles impacted in areas which were too far away from identified artillery targets and which were located around Knin, for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV’s artillery fire. Thus, the Trial Chamber finds that the HV deliberately fired the artillery projectiles targeting these areas in Knin.⁸²

The Trial Chamber’s decision to use a 200m radius as a determinant of whether a particular shell was aimed at a military objective was heavily criticised by many experts in IHL.⁸³ The trial judges’ approach was seen to leave no room for error and therefore have created a de facto strict liability for commanders ordering attacks.⁸⁴ The *Gotovina* Proposed Amicus Curiae Brief contained the calculation that, using the Trial Chamber’s own figures, 96% of the artillery fire around Knin landed within 200m of lawful military objectives.⁸⁵ The experts who put forward the *Gotovina* Proposed Amicus Curiae Brief were concerned that:

it is difficult to reconcile these statistics (even in a light most favorable to the prosecution) to an unlawful target decision-making and execution process. Indeed, the Amici believe that almost any commander would consider such a ratio of valid to invalid effects to indicate legally compliant operations.⁸⁶

It is interesting, however, that the *Gotovina* Proposed Amicus Curiae Brief in fact endorsed the need for ‘some benchmark of acceptable error’ and cited with approval Leslie’s 400m

⁸⁰ *Gotovina* Trial Judgement, paragraph 1906.

⁸¹ *Gotovina* Trial Judgement, paragraph 1907.

⁸² *Gotovina* Trial Judgement, paragraph 1906.

⁸³ See, for example, Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm’ submitted to the *Gotovina* Appeals Chamber on 12 January 2012 (*Gotovina* Proposed Amicus Curiae Brief’) at paragraphs 16-19.

⁸⁴ Laurie R. Blank, ‘Operational Law Experts Roundtable on the *Gotovina* Judgment: Military Operations, Battlefield Reality and the Judgment’s Impact on Effective Implementation and Enforcement of International Humanitarian Law’, Emory Public Law Research Paper No. 12-186 of 28 January 2012, 6-7.

⁸⁵ *Gotovina* Proposed Amicus Curiae Brief, paragraphs 18-19.

⁸⁶ *Gotovina* Proposed Amicus Curiae Brief, paragraph 19.

proposal.⁸⁷ In their view, the question was, apparently, one of the correct margin of error taking into account all the necessary operational parameters rather than whether it was possible to apply a margin of error to a situation such as that in the attack on military objectives within Knin.

Rogier Bartels criticises the judgment from a different perspective. His view is that rather than analysing what elements of the attack had been directed to military objectives, the judges should have accepted that the attack was directed against military objectives and assessed the strikes using the principle of proportionality.⁸⁸ Bartels main argument against a 200m (or 400m) rule is that 'it would effectively create a free fire zone around targets in built-up civilian areas. In a small city such as Knin, stretching out over only a couple of square kilometres, the existence of a number of military objects within the city would effectively allow for the city to be targeted as a whole'. This would not comply with Article 51(5)(a) API and, critically, 'disregards the attacker's obligation to take proportionality into account. It essentially makes void any analysis of the expected incidental damage'.⁸⁹

The writers of the *Gotovina* Proposed Amicus Curiae Brief also noted that they had 'considered the legality of this attack as a whole in accordance with controlling international humanitarian law standards, and not as a series of isolated targeting actions'.⁹⁰ It does not seem that the *Gotovina* Trial Judges thought that they were going against such an opinion; their conclusion that 'too many projectiles impacted in areas which were too far away from identified artillery targets and which were located around Knin, for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV's artillery fire' sounds very similar to a consideration of the attack as a whole.⁹¹

It is unfortunate that the *Gotovina* Trial Judges chose to use this 200m distance, for even the limited reasons on close reading it seems they did, with apparently nothing to support it from

⁸⁷ *Gotovina* Proposed Amicus Curiae Brief, paragraph 17.

⁸⁸ Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, *Israel Law Review* 46, no. 2 (2013): 287.

⁸⁹ Rogier Bartels, *'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials'*, *Israel Law Review* 46, no. 2 (2013): 289.

⁹⁰ *Gotovina* Proposed Amicus Curiae Brief, paragraph 18.

⁹¹ *Gotovina* Trial Judgement, paragraph 1906. Interestingly the Trial Chamber notes in footnote 932 that:

...had these impacts which were at a distance of up to 700 metres from artillery targets been the result of the inaccuracy of the artillery weapons used, that would require a further consideration of whether such inaccurate weaponry can be used in the context of an artillery attack on specific targets within a town.

the testimony of the experienced military practitioners before them. The majority of the Appeals Chamber made short work of reversing the Trial Judges' decision as to the lawfulness of the attacks against Knin and other towns, in large part because there was no apparent basis for this 200m rule.⁹²

Role of military experience

Those with military backgrounds appear to have particularly informed the judges' understanding of the application of the laws of war and use of the key words/phrases/concepts through their testimony even though they were not official 'expert' witnesses. They were particularly clear when they thought what had happened was or was not acceptable military conduct. Given the range of countries for which they had served, this may have given an unofficial 'international' benchmark of acceptable conduct.

In the *Blaškić* Trial Judgement, the judges particularly explicitly rely on testimony from certain military witnesses in relation to the nature of the attacks under discussion (although still not directly as a source of a definition). This can be seen in the case of witness Watters. But then again, in using the description of the situation in Stari Vitez provided by Bower the judges seem to again miss the point that they are describing what could be a perfectly legitimate military position to take, containment of the enemy, although they are vague as to civilian/military mix in Stari Vitez given that there does appear to be a genuine fight after initial surprise attack.⁹³

The exact words and phrases used by these witnesses obviously depend on the questions they are asked and their own level of specific training in the use of artillery and/or the laws of war/humanitarian law, as well as their own discipline and experiences.

Two words that frequently arose in the testimonies of the witnesses with military experience in relation to both descriptions of the shelling of Sarajevo and Knin were 'indiscriminate' and 'random'. As discussed in Chapter 3 (Law), in both the cases of *Galić* and *Gotovina* it is the question of whether civilians were targeted as such that is in issue (whether as a war crime or crime against humanity in respectively), not whether the shelling was indiscriminate. The trial

⁹² *Gotovina* Appeal Judgement, paragraphs 49-84.

⁹³ *Blaškić* Trial Judgement, paragraph 510.

judges in *Galić* had, however, decided that certain indiscriminate shelling could be found to be directly targeting civilians. This was upheld by the Appeals Chamber, who held that

In principle, the Trial Chamber was entitled to determine on a case-by-case basis that the indiscriminate character of an attack can assist it in determining whether the attack was directed against the civilian population.⁹⁴

Following this approach, descriptions of indiscriminate shelling had to be examined to see if, in effect, civilians were being directly targeted.

The word ‘indiscriminate’ is well known in humanitarian law, for example, Article 51(4) API prohibits and sets out various examples of ‘indiscriminate’ attacks. The word ‘random’ does not, however, have any similar pre-determined legal meaning.⁹⁵ The judges gave an indication that the word ‘random’ in this context does have some history with a reference in a footnote to the explanation given by the British Prime Minister to the House of Commons in 1938 of the British protest to General Franco regarding the bombing of Barcelona that

The one definite rule of international law, however, is that direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty’s Government’s protest was based on information which led them to the conclusion that the bombardments of Barcelona, carried on apparently random and without special aim at military objectives, was in fact of this nature.⁹⁶

⁹⁴ *Galić* Appeal Judgement, paragraph 132.

⁹⁵ Note the definition of civilian population given in *Gotovina* Trial Judgement at paragraphs 1704-1705:

1704. Directed against a civilian population. “Directed against” indicates that it is the civilian population which is the primary object of the attack. The attack does not have to be directed against the civilian population of the entire area relevant to the indictment. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Trial Chamber that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.

1705. According to the Appeals Chamber, the definition of civilian for the purpose of Article 5 of the Statute corresponds with the definition of civilian contained in Article 50 of Additional Protocol I to the 1949 Geneva Conventions. Additional Protocol I defines a “civilian” as an individual who is not a member of the armed forces or otherwise a combatant. The Appeals Chamber has emphasized that the fact that an attack for the purpose of crimes against humanity must be directed against a civilian population, does not mean that the criminal acts within that attack must be committed against civilians only. A person placed hors de combat, for example by detention, may also be a victim of an act amounting to a crime against humanity, provided that all the other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against a civilian population.

⁹⁶ *Galić* Trial Judgement, footnote 103 referring to House of Commons Debates, vol. 333, 23 March 1938, col. 1177.

The following paragraphs set out some of the clearest testimony regarding the 'random fire' and discuss what those using the word considered it to mean or signify and how the judges incorporated this in their judgments.

The word 'random' was used in the testimony of Michael Carswell, a former Deputy Sector Commander of the UNMOs in Sarajevo and a retired major from the Canadian armed forces at the time of his testimony. Judge El Mahdi specifically asked Carswell what was the 'exact meaning of the term that you used, of the word that you used'. Carswell's response ties the 'random' nature of the fire to the lack of a 'military value' in the firing of these shots:

A. Yes, sir. "Random," the way I would term it, with artillery, would be a round that would be fired with no real military value. Basically, the gun just lead into an area, in and on an area, and fired with -- without having identified anything specific in that area.

JUDGE EL MAHDI: [Interpretation] So, you are saying, if I understand you correctly, you are saying that "random" means that these were shots that were not targeting military targets; is that correct?

A. In my opinion, yes, sir.⁹⁷

Jeremy Hermer, a former UNMO in Sarajevo and a major in the Royal Marines at the time of his testimony, also used the word 'random', describing what he perceived as an unusual use of mortar (and other indirect fire weapons), with an explanation of why it was apparent that this pattern of fire he had experienced was not being directed at a specific target:

Q. Did you also see examples where mortar fire was being used against other than specific targets, as you have put it?

A. Yes. The -- within Sarajevo throughout that period there was what I would term "general background activity" throughout any one 24-hour period. For example, one would experience general impacting of indirect fire within the city. And this was very different from the coordinated, sustained attacks on specific targets that I have mentioned. These rounds on this -- these incidents appeared to be essentially random, often single rounds fired from artillery or mortar weapons without any kind of follow-up action, which, in respect to indirect fire weapons, is very unusual. Generally, with an indirect fire weapon, it is very difficult to hit a specific target, if not impossible to hit a specific target, with one round. These weapons by their nature are what we term, "area weapons" and they are designed to cover an area of ground with fire. They are not of any real use used individually, one at a time, firing one round. Even if a weapon has been accurately sited and accurately adjusted on to a target, atmospheric conditions will change throughout any given period, be it temperature, wind speed, or humidity and this will affect greatly the accuracy of that weapon so that you could never guarantee where a round is going to land. Therefore, to fire one round and not follow it up or adjust it on to a target would seem pointless, in military terms.⁹⁸

⁹⁷ *Galić* Trial Transcript, 15 May 2002, pages 8425-8426.

⁹⁸ *Galić* Trial Transcript, 15 May 2002, pages 8478-8479.

Hermer did, however, give a reason for which this tactic could be deployed:

The only situation on which I could imagine advocate the use of such weapons in such a manner, would be to generally suppress or harass a large area.⁹⁹

These pages of Hermer's testimony are cited at paragraph 644 of the *Galić* Trial Judgement, in the section on Galić's 'Control over Shelling Activity'. They do not appear, however, to refer to these specific passages and there is no reference to the word random. The judges instead concentrate on the testimony Hermer gave as to the description and use of multiple launched rocket systems ('MLRS'), the judges describing them as 'inherently inaccurate'.

Pyers Tucker, former military assistant to General Philippe Morillon in Sarajevo and a British Army Officer commissioned into the Royal Artillery with substantial experience and training in this role before he arrived in Sarajevo, testified of 'single shells landing arbitrarily around the city, to no identifiable purpose' again making a link to there being no 'military purpose' behind these shots:

Life in Sarajevo was very unpleasant for these people. There were daily random shelling of various parts of the city. There was constant sniper fire and there were intense periods of small arms and artillery fire around the perimeter from time to time as attacks by one side or the other continued. It was a horrible situation.

.....

When I arrived in Sarajevo, there were two types of incoming fire. There was concentrated fire, in other words, multiple shells landing in a short space of time in a particular area. The second type of fire was single shells landing arbitrarily around the city, to no identifiable purpose.

.....

Q. I had asked you to clarify what you meant by, and I quote, "no identifiable purpose," whether you could put that into relation to military or civilian targets.

A. It was not to any military purpose. These were shells which were just landing somewhere within Sarajevo. In other words, in the built-up areas, civilian areas. They were not fired at during any attacks or to defend. They simply were fired into the city.¹⁰⁰

Within their consideration of whether there was a campaign of shelling by SRK forces against civilians, the judges consider the 'Pattern of Fire into ABiH-held Areas of Sarajevo' noting that '[a] general pattern of fire was noticed in Sarajevo during the Indictment Period'.¹⁰¹ Within this

⁹⁹ *Galić* Trial Transcript, 15 May 2002, page 8479.

¹⁰⁰ *Galić* Trial Transcript, 17 June 2002, pages 9900-9901.

¹⁰¹ *Galić* Trial Judgement, paragraph 561.

section the judges cite part of the first paragraph of Tucker's testimony set out above, specifically including the word 'random'. They also include the testimony of Witness Y (whose testimony was heard in closed session so we do not know their identity) that the shelling 'was deadly because of its random nature'.¹⁰²

Carl Harding, a former UNMO in Sarajevo and retired member of the Royal Air Force regiment at the time of his testimony, gave evidence that compared the understandable military attack in Otes to a barrage of artillery fire into the city on 31 October 1992. This tied the random nature of the shots to the lack of a military objective but also, notably, not to the lack of a functioning system of command and control; this was because of the coordination of the start and end times of the attack and the amount of ammunition used:

A. Well, Otes was a proper military attack, and we would have said those former orders to instigate the attack, there was command and control at various levels to achieve the objective which was in such a concentrated area. On the 31st of October, there was no concentration of fire. It was random from what I could see, and from what my observers could see, although it started at the exact time of 1000 and it finished at 1600, there was no obvious objective to be seen by myself or the observation posts.

Q. Now, did the timing, what you just referred to, the direction of fire and the range of calibres involved, tell you anything as to the degree of planning involved and the levels -- the command levels which would have been involved?

A. Do you refer to Otes or the 31st of October?

Q. To the 31st of October.

A. Well, on the 31st of October, all the weapons started to fire exactly the same time, 1000 hours. And there was an obvious ceasefire at 1600 hours. The weapons were from various locations around the city. They must have been by the amount of ammunition that was landing. So there was a certain amount of command and control and orders given for them to start firing at the same time. But the targets that they were given were not obvious to us, as the rounds were so spread out as opposed to Otes when all the rounds fell within the square I marked on the map.¹⁰³

Although the military witnesses describing this random fire could not always definitively say that it was not in fact directed to mobile military targets within otherwise civilian areas, they did have an answer to this Defence argument. For example, in Jeremy Hermer's testimony under cross examination he accepted a theoretical possibility that there was a mobile military target at a location he had described as civilian. In his answers under redirect examination, however, he gave evidence of how few mobile military targets he had actually seen.¹⁰⁴

¹⁰² *Galić Trial Judgement*, paragraph 561.

¹⁰³ *Galić Trial Transcript*, 25 February 2002, pages 4383-4385.

¹⁰⁴ *Galić Trial Transcript*, 16 May 2002, pages 8524-8525.

Francis Thomas, who served as United Nations Senior Military Observer, Sector Sarajevo and was a former member of the Canadian Armed Forces at the time of testifying, testified to certain cases where there was no possibility of there being a mobile military target within a civilian area:

These are cases that I can categorically say that military observers saw civilians being shelled, but there was no Bosnian presence.¹⁰⁵

There was also evidence given that the return fire in response to fire from mobile targets was not limited to attempts to attack those mobile targets. Richard Mole, a Lieutenant-Colonel in the British army when he was posted to Sarajevo as a United Nations Senior Military Observer, testified to 'a degree of overkill in response'.¹⁰⁶

The *Galić* Trial Judges use the concept of 'random' shots when in relation to the shelling of the football match they state:

Had the SRK forces launched two shells into a residential neighbourhood at random, without taking feasible precautions to verify the target of the attack, they would have unlawfully shelled a civilian area.¹⁰⁷

This use of the term 'random' fire by the witnesses such as those described above was most clearly incorporated into the trial judges' 'Conclusion on Whether there was a Campaign of Sniping and Shelling in Sarajevo by SRK Forces' where the judges observe that 'The most populated areas of Sarajevo seemed to be particularly subject to indiscriminate or random shelling attacks.'¹⁰⁸ This finding is an important part of the overall conclusion that the forces around Sarajevo were engaged in a campaign directed against civilians as such.

The concept of 'random' firing of artillery arose again in the testimony provided in the *Gotovina* case. Andrew Leslie, at the time of testifying a Lieutenant-General in the Canadian Armed Forces with a particularly detailed knowledge of the use of artillery (having been a gunner and artillery officer and risen to command the 1st Regiment Royal Canadian Horse Artillery before rising even further through the ranks) distinguished the idea of 'random' shots from how groups of guns would target a particular object if that was their actual intention. He provided a detailed description of this targeting process:

¹⁰⁵ *Galić* Trial Transcript, 31 May 2002, page 9395.

¹⁰⁶ *Galić* Trial Transcript, 4 July 2002, page 11127.

¹⁰⁷ *Galić* Trial Judgement, paragraph 387.

¹⁰⁸ *Galić* Trial Judgement, paragraph 584.

Q. Now, this process you've just described, with a shell and then another shell and then a group of shells, were you familiar with that process; and if so, can you tell us its significance?

A. I am familiar with the process. And in my opinion, the significance is that after the additional -- the original opening barrage, which appeared to be random and relatively evenly distributed across the entirety of the town, the Croatian gunners were then engaging in what is known as target grid procedure, wherein a battery of guns, which can be two, three, four, five, six guns grouped together, would be adjusted by visual observation on to a specific target. The process is one gun fires of that grouping; the visual observation correction is then made to move that shell; corrections are then computed and passed to the other guns; another round is fired from the original gun to adjust that specifically on to where your target might lie. Then once the observer is relatively satisfied that his one gun is in the target area, because artillery is an area weapons system, or certainly was in those days, then all the guns of the battery would be fired at that single point; and therein you'd have three, four, five, or six detonations in relatively close proximity both in time and space. It's a process I've seen hundreds of times in a variety of training exercises in Canada and other artillery ranges throughout NATO.

Q. So that's the process of directing the weaponry toward a particular target?

A. Yes.¹⁰⁹

Expert Witness Corn provided the counter argument to the proposition that there was random fire into Knin, essentially targeting civilians, when he set out that 'there were military objectives dispersed all over the city by the enemy forces' and that one interpretation of the evidence would be that from a distance 'it will look like there are rounds exploding all over the city because there were objectives all over the city'.¹¹⁰ This is cited at paragraph 1170 of the Trial Judgement. This testimony of witness Corn is particularly interesting as it discusses what a witness within Knin would actually be able to tell (or not) about the intended effect of the shots they were observing.

In Section 4.4 of the trial judgment, 'Unlawful attacks on Civilians and Civilian Objects', the *Gotovina* Trial Chamber noted Dawes' use in his witness statement of the word random to describe the shelling at a particular point in time.¹¹¹ It also refers to Stig Marker Hansen, an ECMM monitor in Knin from June to September 1995 and head of ECMM Knin from approximately 5 September to 23 September 1995¹¹² and Joseph Bellerose¹¹³ using this description to differentiate the different patterns of shelling they observed.

¹⁰⁹ *Gotovina* Trial Transcript, 22 April 2008, page 1943.

¹¹⁰ *Gotovina* Trial Transcript, 8 September 2009, page 21239.

¹¹¹ *Gotovina* Trial Judgement, paragraph 1284.

¹¹² *Gotovina* Trial Judgement, paragraph 1295.

¹¹³ *Gotovina* Trial Judgement, paragraphs 1299, 1337.

These witnesses with military experience also provided evidence describing their impression of the deliberateness of attacks on civilians implied by this 'random' firing. This was their view of the intentions of those behind the guns/mortars/rockets and those who were commanding them.

The former Senior Military Observer, Richard Mole, provided evidence of a lack of military objective for some of the 'random' shots fired into Sarajevo. In addition to this, there is a sense from his observations on what he was told that there was more than a disregard for the civilian population, it was in fact inevitable they were going to be hurt by the actions of those 'warming the barrels':

Q. In relation to the incident where you were given the -- incident or incidents where you were given the explanation of warming the barrels, were you able to draw any conclusions as to where the round or rounds were likely to land?

A. The rationale for firing the weapon that had been given to me was as irrational and as vague as the assumed target; in other words, I don't think there was a specific target.

Q. Were you able to form any view as to whether the rounds fired on that occasion threatened, potentially, civilians?

A. In that the rounds were random, in that they were fired towards the city of Sarajevo, there's a very high percentage chance that they were random and fired into civilian areas, because it was not explained to me that they were targeting a military target. I've told you the reasons why they fired the weapons. That would hardly be a sensible answer if they had a legitimate military target.¹¹⁴

Mole's testimony also pointed out a link between the random shelling of Sarajevo and the pressure put on the Bosnian Presidency to act in a certain way:

Q. When you say, "the usual severe response," what do you mean?

A. It was a usual modus operandi that random shelling of the city of Sarajevo would occur if certain other events were having been brought to the attention of the Presidency side, not fulfilled.¹¹⁵

Although the judges do not cite this particular testimony of Mole's which mentions 'random' shelling, the various correlations between the attacks found to be directed against civilians and the need for the Bosnian Serb politicians and military to put pressure on the Bosnian Presidency was a key element in the judges' consideration of Galić's responsibility as has been discussed in Chapter 6 (Responsibility).

¹¹⁴ *Galić Trial Transcript*, 7 June 2002, page 9822.

¹¹⁵ *Galić Trial Transcript*, 2 July 2002, page 11034.

Under the sub-heading 'Control over Shelling Activity' in the section 'Was General Galić in effective command of the SRK Forces throughout the relevant period?' the judges refer to Tucker's testimony regarding a threat by a senior Bosnian Serb commander to shell the city that Tucker took to mean that if this commander's demands were not met, 'the execution of the threat implied the firing of artillery shells at random into Sarajevo, in other words, at the civilian population in Sarajevo'.¹¹⁶

The witnesses of the shelling of Knin in the *Gotovina* trial used the term 'harassment' alongside 'random' to describe what was happening. The 'harassment' of military forces would be a legitimate use of artillery but many of the witnesses were convinced it was the civilians that Gotovina's forces intended to harass. Robert Williams, a Military Information Officer for UNPROFOR in Knin at the time of Operation Storm, with the rank of Colonel in the Canadian Armed Forces at the time of his testimony, described sporadic shots not aimed at any particular military target:

Q. ...Colonel, can you explain to the Court what you mean by "harassment fire" in the residential areas?

A. Certainly. What I mean by "harassment fire" is not directed at a specific military targets but one or two shells directed in an area to convince people to leave, not necessarily targeted at a house but near enough to a house or building to encourage the occupants, if they remained, that they should leave.

Q. And what was it about what you saw that made you think it was intended to speed up the flight of civilians?

A. The fact that it was fairly sporadic. The heavy bombardment had already occurred earlier in the day. It lessened in the afternoon and then random or fairly random shots in one or two in different areas to encourage people to leave. It was not an intense bombardment from any-- from my point of view and my opinion only, military usefulness.¹¹⁷

Joseph Bellerose, Sector Engineer for UNCRO Sector South and in Knin at the time of Operation Storm, retired at the rank of lieutenant-colonel from the Canadian armed forces at the time of testifying, was clear in his witness statement that his view was that the shelling of Knin was for the purpose of making the civilian population leave. He was questioned on the basis for this view in some detail during his testimony. He repeatedly used the word 'random' to describe the nature of shells that were being fired as opposed to the fire being directed against a

¹¹⁶ *Galić* Trial Judgement, paragraph 649.

¹¹⁷ *Gotovina* Trial Transcript, 25 September 2008, pages 9533-9534.

military objective. In defining what he meant by 'harassment fire' he also emphasised the random nature of the locations where the shells were landing:

Q. ...First let me ask you, what was the basis for your opinion that the shelling was carried out to drive away the civilian population?

A. In my opinion, if there would have been military target in those location that would have been causing a threat to the Croat forces, they would have been more intensive and direct at a specific target, be more concentrated.

Q. Can you tell the Court what you observed that was not consistent with that?

A. The artillery fire wasn't concentrated into one location. It was landing all over the town more to a random fashion and at random interval.

...

Q. Thank you. You also offered the opinion that it was deliberate harassment fire, and I would like you to please explain for the Court what you meant by that.

A. Because it was like a random firing all over the place and random interval, you know, for me, I believed that this is -- this is a situation that will make the occupants of the town, if they were still there, wondering if they were going to be next or when the next round was going to land, if it would be close to their place. Just that, I don't know, it's hard for me to explain, but it wasn't -- makes you wonder if the next round is going to be in your backyard as opposed to, you know, five -- 500 metres or, you know, five miles down the road.¹¹⁸

This testimony of Bellerose is specifically cited at paragraph 1337 of the *Gotovina* Trial Judgement, including a quote of Bellerose's phrase 'in a random fashion and at random intervals'. This is the second time that Bellerose's use of the word random is mentioned by the judges, this mention is in relation to the shelling on 5th August, the first mention related to his description of the shelling on 4th August.¹¹⁹

The prosecution expert, Konings testified as to his interpretation of an artillery report that stated 'In irregular intervals, a total of 18 projectiles were fired from a T-130 millimetre at the general area of Knin' that:

...a total of 18 projectiles against irregular intervals -- on irregular intervals bring me to the feeling, to the idea - and, of course, I do not have the hard proof of that in this case - that this is a random use of artillery against the so-called general area of Knin which can be everything. It's not confined. It can indeed be some forest areas. It can be indeed the military area, but it can be damn-well a civilian area because they are the most in Knin.

And by doing so, firing 18 projectiles in irregular intervals against an area where we cannot deny that there are a lot of civilians in there, you advocate here the use of artillery in a harassing way. There is no proof of that. It is only a report. I know that, but it is already ordered in the OP order that we discussed in the beginning that the artillery had to put the town of Knin under artillery fire under shelling also there

¹¹⁸ *Gotovina* Trial Transcript, 7 July 2008, pages 5871-5872.

¹¹⁹ *Gotovina* Trial Judgement, paragraph 1299.

without any specification without any effect, without any objective to be reached by that artillery.¹²⁰

In section 4.4.2 'General Considerations' relating to unlawful attacks, the judges summarise Koning's evidence and although they do not cite this specific passage this summary also contains a reference to random firing as mentioned in Konings' expert report:

Konings stated that when giving the order to shell a city the detailed specification of military targets is an absolute precondition, otherwise the vague nature of the order may be interpreted as ordering, or at least permitting, commanders to fire randomly into the named cities. Firing rounds at a city without specifying a target involves willingly and deliberately taking the risk that those rounds will fall in an area where only civilians live, and can have only the psychological effect of harassing fire on civilians. Konings further stated that the 4 August 1995 report of TS-4, which referred to firing artillery at a general, civilian populated area, required further detailed explanation with a clear reference to implied rules of engagement and objectives.¹²¹

Although this alleged intention to force civilians from their homes by the use of harassment fire was accepted by the Trial Chamber, it was overturned by the Appeals Chamber's findings. The final section of this chapter will consider what the difference was between the cases of *Galić* and *Gotovina* that led to such different appeal findings. First, however, the contribution of civilian witnesses will be considered.

Role of civilian evidence

A theme that emerged from the analysis of the judgments and the testimony referred to in them, was that the evidence non-military witnesses who had lived through a military campaign could provide the judges was arguably equally important as those with military experience in educating the judges. They were the key source of information on the physical effects of artillery. At times they were also particularly clear as to from where a shot had been fired where a technical analysis was unable to give a firm answer.

When any witnesses gave evidence that they knew from where a shot had come from the question is whether this is because that is where they knew the shells landing on their area had usually come from or whether it was that they could tell from experience where a particular shot had been fired from. Excluding the possibility that a shot could have been fired

¹²⁰ *Gotovina* Trial Transcript, 14 January 2009, page 14427.

¹²¹ *Gotovina* Trial Judgement, paragraph 1172.

from somewhere else was an integral part of the judges' assessment of the scheduled shelling events. Civilian witnesses had a depth of experience that could not lightly be put aside.

Civilian non-technical witnesses in fact learned relevant technical information from their experience. For example, Mehmed Travljanin, a policeman and café owner in Sarajevo, testified that

And it was normal for us in Sarajevo in those days to hear explosions, and we would try and assess even how powerful it was. Even old women knew the type of shell, whether it was 62 or 155.¹²²

This section considers two examples of this strength of non-technical witness testimony, firstly the water queue shelling incident and then in relation to the shelling of Markale Market.

The water queue shelling incident

In this charge the source of fire was not so strongly contested as for the Markale Market charge. It was the intended target that presented the harder question to the judges. In this incident it is the behaviour of the civilians while they are waiting for their turn to collect water that is perhaps the most telling.

Rasim Mehonic, a pensioner at the time who had been waiting in the queue, testified that the people queuing for water were doing so knowing that they were a potential target and attempting to wait under cover to minimise the chance of being shot:

Q. When you say that there were about 100 canisters, is it on the basis of the number of canisters that you have come to the conclusion that there were 100 people or were there actually 100 people?

A. I concluded on the basis of the canisters because I couldn't see the people as they were hiding under the stairway and I couldn't count the people.

Q. So you are telling us that in the street where you saw the canisters, you weren't able to see the people; the people weren't lining up in a traditional line?

A. How could they line up as there were snipers shooting and they wouldn't let anyone in peace? Would you stand there and let someone shoot at you?¹²³

¹²² Galić Trial Transcript, 28 March 2002, page 6355.

¹²³ Galić Trial Transcript, 16 April 2002, page 7339.

Witness AE, also a pensioner at the time and waiting in the queue for water, provided similar testimony. She refused to agree that the risk to the civilians was because of their proximity to the confrontation line and gave evidence to the effect that the risk was instead due to the danger inherent in being a civilian within Sarajevo at that time:

Q. I will repeat it, Madam Witness. You said that the authorities, that is to say, your police, had warned you. Is that correct? Have I understood you correctly?

A. Yes.

Q. I see that you agree with that. Thank you. Madam Witness, were you warned of the existence of such a risk? Is that true?

A. Yes.

Q. Madam Witness, was this risk really connected to the proximity of the confrontation line?

A. No.

Q. Madam Witness, what was this risk related to?

A. Well, the risk concerned you leaving your house every day. You could be killed.

Q. But, Madam Witness, would you agree with me in saying that you risked being wounded and there was a greater probability of this happening if you were near the line of confrontation or at the line of confrontation, and the risk was greater than if you had been at a distance from this line?

A. I don't agree with you.¹²⁴

The witnesses knew that they were a potential target and likely to be being targeted. This was from their experience of the conflict and what it meant for civilians in Sarajevo. This was translated into the Trial Judgement where the Trial Judges stated:

In view of the evidence in the Trial Record, the Majority is satisfied beyond reasonable doubt that the intended objective of the mortar shell fired on 12 July 1993 in Dobrinja "C5" was not the construction work for a trench leading to the airport tunnel, nor the ABiH command and frontlines, but the well where civilians were expected to be found and used.¹²⁵

Markale Market

The source of fire of the shell that hit Markale Market on 5 February 1994 was strongly contested and the judges spent a significant section of their judgment describing and analysing the evidence they had before them. The judges were not able to reach a unanimous decision

¹²⁴ *Galić* Trial Testimony, 22 March 2002, page 6029-6030.

¹²⁵ *Galić* Trial Judgement, paragraph 396.

on this charge and Judge Nieto-Navia included a strong dissent on the majority's findings on the responsibility of Galić for this shelling.¹²⁶

Despite his thorough demolition of the majority's calculations regarding the technical analysis of the Markale Market shelling, when turning to the section of the majority's findings entitled 'c. Non-technical evidence concerning the source of fire', Nieto-Navia is, however, less convincing. He only describes how Witness AF's evidence cannot be relied on to establish the source of the shell. He does not counter the evidence from Suljić (who interviewed people from along the trajectory of the shell) or Witness AK-1 who were also specifically relied on in this regard by the trial chamber. He also does not mention Witness P who gave similar evidence mentioned earlier in the judgment.¹²⁷ This section attempts to demonstrate that it is possible that it was the experience of the citizens of Sarajevo (as opposed to the technical or expert evidence) that gave the majority the confidence to find, beyond any reasonable doubt, that General Galić's forces had fired the shell that hit Markale Market.

Under their heading 'c. Non-technical evidence concerning the source of fire', the majority of judges refer to Witness AK-1's evidence as follows:

At the time of the incident, Witness AK-1 was at her house in Sedrenik, located approximately 500 metres south to the confrontation lines, when she heard firing from the direction of Mrkovići.¹²⁸

The testimony surrounding that specifically referred to by the judges sets out the experience of the civilian witness that leads to her confidence in her knowledge of where the shot was fired from. It also includes that she was sure that the shot she heard fired from Bosnian Serb territory was the one that hit Markale Market.

This experience becomes apparent when Witness AK-1 testifies to frequently hearing shots from Bosnian Serb held areas and, because of the geographical location of her house, being able to see the shells landing on the city:

Q. Thank you. Now, did you hear shells being fired during the conflict?

A. Yes.

Q. Was this a frequent or infrequent observation that you made of hearing shells fired? Did you hear it frequently or infrequently?

¹²⁶ Nieto-Navia Partial Dissent, paragraphs 71-101.

¹²⁷ Nieto-Navia Partial Dissent, paragraph 95.

¹²⁸ *Galić* Trial Judgement, paragraph 454.

A. Frequently.

Q. Can you say if you heard the sound of the firing coming from any particular community?

A. Yes, yes. From when -- they were fired from Mrkovici, then one could hear them better when they were fired from Mrkovici than from some other parts of the city. When they came from this part, I could hear them well.¹²⁹

Witness AK-1 was sure she heard the shot that hit Markale Market on 5th February 1994 being fired and that it came from a Bosnian Serb held position.

Q. Now, while you were out on the balcony, did you hear anything in particular after 12.00?

A. Yes. I heard a shot being fired, but I didn't move. I just stayed on the balcony.

Q. When you say "a shot," could you tell us what you heard? A shot sounding like what? What did the shot that you speak of sound like?

A. Well, that sound, that sound was the regular sound that I heard always both from Mrkovici and from Trebevic. It's like when a plastic bottle bursts.

.....

Q. Did it -- from what type of weapon did it -- did this shot sound like it was fired from? Heavy or light weapon?

A. That sound was always made by a shell.

Q. After you heard this sound which you describe as always being made by a shell, did you observe anything in the vicinity of the city?

...

A. I'm rather high up. My house is on a slope, and it was a clear day where I lived, because we're on a hill. But in the city, it was rather cloudy. It was rather overcast. And nevertheless, I could see smoke coming out from that part of the market, lots of smoke.

Q. Which market is that?

A. Markale.

Q. About how long after you heard the shot of the shell from Mrkovici did you see the smoke coming from Markale?

A. Well, it didn't take long. Could have been --

Q. Could you estimate the time? Just an estimate, please.

A. Well, a couple of seconds. Not long.

Q. What do you mean by "a couple"? Could you just give us an estimate in numbers? We know it's an estimate. We know you can't be certain.

A. I don't know. Could have been five seconds, say. Really, I can't judge. I can't assess that.¹³⁰

Witness Suljić was a lawyer who spent a year in the ABiH before transferring to work as a crime scene inspector for the Security Services Centre (the police force in Sarajevo) and was in the War Crimes and Genocide department at the relevant time. The judges refer to his testimony as follows:

¹²⁹ *Galić Trial Testimony*, 15 March 2002, page 5448.

¹³⁰ *Galić Trial Testimony*, 15 March 2002, pages 5448-5450.

Suljić testified that after it was determined that the shell was launched from the direction north north-east, he conducted interviews with persons living along the flight path of the shell and these interviewees confirmed that the shell was fired from the direction of Mrkovići.1646 [1646 Sulji], T. 6903.]¹³¹

Witness Suljić's testimony (including at the page referred to by the judges in their footnotes) again provided more detail and evidence of his confidence in his findings. Under cross examination he provided the following testimony which set out why he was convinced by what people he interviewed told him, even if they were 'lay persons':

Q. Can you please tell us what these people told you, what they had heard?

A. All these people -- most of these people who were in their apartments at the time or just outside their houses, they stated that they had heard at the specified time the shell being fired, the sound of the shell flying over and the explosion, which was followed by a plume of dark smoke from the location of the city centre and the Markale location, according to their testimony.

Q. Can you confirm that all these people that were interviewed were, in fact, the people who are lay persons, who have never been in contact with any shells? And did they not confirm to you that they were not present when shells were fired?

A. Since this was the second year of the war, all the citizens had quite a lot of experience and quite a lot of knowledge of the shells and projectiles so that these citizens, in fact, had already seen the explosions of projectiles.

Q. According to you, on the basis of the sound that follows the firing of the shell, is it possible to determine the direction from which it was fired on the basis of the sound?

A. If you hear the moment of the firing and the explosion of the shell that follows later on and if you hear the sound of the projectile flying over your head, you can assume from which direction the shell had been fired, more or less. And you can see where it exploded.¹³²

The problem with this evidence is apparent, however, in the use of the words 'assume' and 'more or less' in the final paragraph of the extract. These words do not tend to convince on a beyond reasonable doubt standard because of the element of presumption and lack of accuracy involved. Beyond this, however, it is also clear that those living in Sarajevo did have significant knowledge of who was firing from where and at what.

Witness P, another civilian, could actually see certain firing positions from her house:

A. During the war, I was in Sarajevo. I worked throughout the war. I would have to pass through the town. Everything was shelled. And from the window of my house, I was able to see the firing positions. When you're looking straight ahead from my window, the view is not obstructed in any way, so it was possible for me to see the positions from which the shelling came.

¹³¹ *Galić Trial Judgement*, paragraph 454.

¹³² *Galić Trial Transcript*, 9 April 2002, pages 6903-6904.

...

Q. Which district could you see from which the shelling came?

A. Boriје, straight ahead. Then to the right, Trebević. And Spicasta Stijena on the left-hand side, with Mrkovici just above it.¹³³

Her evidence as to the source of the shell that hit Markale Market relied on her knowledge of the location of the firing positions and being able to tie this in with the sound she heard on the day of the shelling of the Markale Market:

Q. ...At about 12.00 that day, where in particular were you in your house?

A. I said -- sorry, I was at home, at the window, talking with a neighbour living above me.

Q. While you were there talking with your neighbour, did anything happen that you noticed?

A. It was incredibly quiet, a very calm day.

Q. And did you notice anything while you were there talking with your neighbour?

A. No. No. Nothing.

Q. Very well. Can you say what the weather was like that day?

A. Quite nice.

Q. And while you were there at your window talking with your neighbour, what happened?

A. We heard a bang -- I mean, that something was fired. And there was this strident sound going over the building.

Q. The sound you heard, the bang you heard, from which direction did it come?

A. From Mrkovici.

Q. About what time did you hear this bang?

A. It was 12.00, 20 past 12.00, thereabouts. I'm not quite sure. I don't know the exact time.

Q. Now, after you heard that bang, did you hear or observe anything in the town of Sarajevo?

A. And then we heard a harsh sound, and I knew that that shell had fallen nearby.¹³⁴

There was further evidence from Hadzimuratovic, a taxi driver who was near the market when the shell hit it, corroborating the other witness' statements:

Q. You said a shell fell. Prior to when this shell fell, did you hear or see anything?

A. Yes, I heard the whistle of the shell as it flew over my head.

Q. When you first heard the whistle of the shell, which direction was it coming from?

A. It came from the north, from the direction of Mrkovici.

Q. Was this the first time you had heard the whistling of a shell?

A. Yes -- no. It wasn't the first time for me. It was the first time that day.

Now, after you heard the whistling of the shell passing over you, did you hear anything after that?

A. Yes, I heard the glass being broken and explosion, and then people started running towards me, fleeing from the market.

¹³³ Galić Trial Transcript, 18 March 2002, page 5538.

¹³⁴ Galić Trial Transcript, 18 March 2002, pages 5541-5542.

Q. Where did the sound of the explosion come from?

A. To my left.

Q. Do you know the place where it came from?

A. Yes, from the market.¹³⁵

The judges had seemingly had similar critical thoughts about the evidentiary value of this form of testimony as in the same paragraph as the references to Witnesses AK-1 and Suljić's evidence set out above, the judges finish by stating:

Weapon specialists indicated that the noise made by the firing of a mortar can be used to determine the approximate direction of fire. Hamill testified that an observer hearing the sound of a mortar being fired "will not be able to determine a location, just a direction."¹³⁶

In their conclusions to their findings on the shelling of Markale Market the judges state that:

The Majority also emphasises that non-technical evidence supports the finding that a heavy weapon was fired from the direction north-northeast of Markale market from SRK-controlled territory at the time of the incident. The Trial Chamber finds reliable the testimony of Witness AF who heard at the time of the incident the sound of a heavy weapon being fired from behind an SRK position, Spicasta Stijena, at Mrkovići. The fact that Witness AF was at his mother's house in Sedrenik when he heard that sound and not at his place in Vratnik does not cast doubt on his ability to assert a direction. The Majority is convinced by the evidence in the Trial Record, which establishes that the noise made by a firing mortar can be used to determine the approximate direction of fire.¹³⁷

This shows that the majority of the trial judges found it important to include the evidential support that non-technical evidence gave their finding of the source of fire of the Markale Market shell. This is consistent with their approach to other shelling incidents which included a record of the absence or presence of non-technical witness evidence as to the source of fire alongside more technical assessments, although even where there was such evidence they did not always find it sufficiently strong to base their findings on.¹³⁸ The judges also set out in some detail the non-technical evidence they had received as to the source of the shelling in the different areas of Sarajevo in general as opposed to in relation to the scheduled incidents.¹³⁹

¹³⁵ *Galić* Trial Transcript, 11 March 2002, page 5077.

¹³⁶ *Galić* Trial Judgement, paragraph 454.

¹³⁷ *Galić* Trial Judgement, paragraph 491.

¹³⁸ See, for example, *Galić* Trial Judgement at paragraphs 334-335, 340 (Scheduled Shelling Incident 3), 402-403 (Scheduled Shelling Incident 4).

¹³⁹ See, for example, *Galić* Trial Judgement at paragraphs 368-370 (Dobrinja), 436 (Stari Grad).

The next section will set out a comparison of the approaches to and evidence received in relation to the shelling of Sarajevo and that of Knin in order to demonstrate the critical roles of expert, military and non-technical evidence in relation to charges of attacks against civilians.

Comparison of the application of the principle of distinction in charges related to the shelling of Sarajevo and Knin in the context of expert/non expert/technical evidence

One of the main impressions that arises from the transcripts of the trial of Galić is that the civilians living in Sarajevo through the indictment period had become, through hard experience, the experts on the shelling of the city. This is meant in the sense that they did not just know ‘what it was like’ to live through the years of the war in Sarajevo, they also tended to where the shots were being fired from and reasons for the different patterns of shelling. The argument of this section, building on the earlier parts of this chapter, is that their evidence was crucial to the findings of the trial chamber that the civilians rather than military objectives were being targeted.

The shelling of Sarajevo and Knin were very different sets of actions. The shelling of locations within Sarajevo occurred over several years, in Knin it was only for 2 days. The number of troops within and defending Sarajevo was significant, those within Knin a lot less so. The Gotovina Proposed Amicus Curiae Brief succinctly summarised the situation in regard to Knin:

As the Trial Chamber acknowledged, this was not a situation of blatant indiscriminate attacks on civilian population centers, or groups of assembled civilians. Based on the Trial Chamber’s own findings, the targeting in Knin involved placing numerous lawful military objectives located within the city under attack in an effort to disrupt and degrade enemy capabilities in support of a deliberate main effort attack against entrenched SVK defensive positions with the objective of breach and exploitation of those defenses.¹⁴⁰

In the case of Sarajevo there was no attempt to take control of the city after the initial phase of the conflict. Although there was significant intermingling of civilians, military personnel and some military objectives, there was also less of a military imperative to fire into the city given that there was not a drive to take control of the city. The reference from the *Gotovina* Proposed Amicus Curiae Brief to ‘blatant indiscriminate attacks on civilian population centers, or groups of assembled civilians’ seems to be a reference to the attacks on civilians in Sarajevo.

¹⁴⁰ *Gotovina* Proposed Amicus Curiae Brief, paragraph 2.

The means by which unlawful attacks were charged were also different. Galić was charged with ordering unlawful attacks as a war crime, Gotovina was charged with ordering unlawful attacks as an act of persecution as a crime against humanity. In the case of Sarajevo the judges were presented with specific incidents in the form of a schedule to the indictment which formed the backbone of the evidence presented to them, however, they also recorded in the judgment the evidence of the general situation in Sarajevo and about other incidents by area. In relation to the scheduled incidents, they took the evidence for each separately and in turn considered whether there was a possible military objective that could have been the actual object of the attack. In relation to Knin, there was no such schedule. The judges started by asking where the military objectives were and whether they were what was being targeted. This seems to be the reverse approach to that adopted for Sarajevo in the *Galić* Trial Judgement. This could be because of the relatively smaller size and therefore complexity of Knin, but also perhaps because of criticism such as that from Judge Nieto-Navia that the approach to the situation in Sarajevo did not do the complexity of the intermingling of military and civilians justice.

The part of the *Galić* Trial Judgement regarding the second scheduled shelling incident is an example of the *Galić* Trial Judges' approach to the assessment of the question as to whether the attacking forces were respecting the principle of distinction or whether they were targeting civilians. A single 82mm calibre mortar shell landed on a water collection point, a queue of approximately 50-60 people in Dobrinja 'C5', and killed over ten and wounded over ten more.¹⁴¹ As can be seen from the witness evidence set out in the section on non-technical evidence above, those queuing for water had been there for many hours despite the fact that they felt unsafe as a concentrated group of civilians collecting water.

The majority of the Trial Chamber were of the view that the shell originated from SRK held territory. They found that there were 'no immediate military objectives near the well' and, given in particular that the area around the well was repeatedly shelled after this specific incident, that the intended target had not been 'the construction work for a trench leading to the airport tunnel, nor the ABiH command and frontlines, but the well where civilians were expected to be found and used'.¹⁴²

¹⁴¹ *Galić* Trial Judgement, paragraphs 390-391.

¹⁴² *Galić* Trial Judgement, paragraph 396.

Judge Nieto-Navia, however, did not agree and was not 'satisfied that the Prosecution has established beyond a reasonable doubt that this projectile was deliberately fired from SRK-controlled territory with the intention of harming civilians',¹⁴³ given the lack of certainty of the direction of the source of the shell and the 'significant ABiH presence in the vicinity of the water pump'.¹⁴⁴ Judge Nieto-Navia refers specifically to the presence of

- the entrance of the tunnel from Dobrinja to Butmir, under construction at the time, which was placed from 30 to 200 metres away from the site of the incident by varying sources of evidence.¹⁴⁵ (He also points out that it was unclear if the SRK knew of the location of the Dobrinja entrance.)
- an ABiH command post approximately 100 metres from the water pump.¹⁴⁶
- The front line. Evidence was presented that it could have been 'as close as 50 metres' to the site of the incident.¹⁴⁷ Other evidence was presented that it was about 150 to 200 metres away.¹⁴⁸
- Military trenches about 50 metres from the site of the incident (although witness was not sure if they were present at the time).¹⁴⁹
- ABiH positions near the airport which were the objects of SRK fire in the area.¹⁵⁰

Given the 200m rule adopted in *Gotovina* and the criticism of it for requiring too strict a standard of those firing at military objectives, the distances here are quite immediate. If the logic of the *Gotovina* case was followed (and these military objectives accepted as such) shells or bombs landing within these distances set out by Judge Nieto-Navia would have been accepted as having been lawfully fired.

Something was clearly of importance beyond actual physical distances in the assessment of the application of the principle of distinction in the case of *Galić* at least. In both cases the artillery gunners were seen as being *capable* of being accurate, given that they were professional and well trained. Both had significant intelligence of their potential targets. All were under a duty according to IHL to apply precautions in attack.

¹⁴³ Nieto-Navia Partial Dissent, paragraph 66.

¹⁴⁴ Nieto-Navia Partial Dissent, paragraphs 67-68.

¹⁴⁵ Nieto-Navia Partial Dissent, paragraph 68.

¹⁴⁶ Nieto-Navia Partial Dissent, paragraph 68.

¹⁴⁷ Nieto-Navia Partial Dissent, paragraph 69.

¹⁴⁸ Nieto-Navia Partial Dissent, footnote 243.

¹⁴⁹ Nieto-Navia Partial Dissent, paragraph 69.

¹⁵⁰ Nieto-Navia Partial Dissent, paragraph 69.

The expert witness Richard Higgs, who had recently retired from the British Army having served in it for 22 years gaining expertise in artillery, small arms and mortars,¹⁵¹ testified as to the fact that the distance by which the shot had missed the entrance to the tunnel, the angle by which it was fired and the fact that a second shell was not fired meant that, in his opinion, it was not the entrance to the tunnel that was being targeted:

Q. What observations, if any, would you make on the theory that the intended target was not the water line, but the area immediately in front of the tunnel entrance?

A. Now, the evidence, as I have it, does not lead to that -- for me to make that conclusion, as the round has missed by quite a considerable distance, take into account that this is a city location and some of the factors that go with that. And also, that -- then the tunnel was not reengaged with a more accurate round.

Q. What about the difference in angle? Is that of any significance or not?

A. The degree by which it has missed would not be one I would expect to see if this target had been pre-recorded. It is too great. And for that reason, it makes me believe that the round did hit its intended target.¹⁵²

The trial judges do not refer to this evidence from Higgs in their majority conclusion that 'there was no immediate military objectives near the well, which could have explained the firing of a shell in that area'. They emphasised the fact that 'the area around well where civilians pumped water was repeatedly shelled after the shelling incident of 12 July 1993' and that the target 'was not the construction work for a trench leading to the airport tunnel, nor the ABiH command and frontlines, but the well where civilians were expected to be found and used'.¹⁵³

The testimony of the non-expert witnesses as to the dangers to civilians waiting to collect water therefore seems to have been the crucial element in the majority's finding. Their finding was also, however, in accordance with the expert assessment of Higgs that the entrance to the tunnel was not the intended target and there was 'no military purpose in firing one round alone at this location'.¹⁵⁴

The judges in the *Gotovina* Trial Judgement considered the attacks against several towns and villages, however, Knin was the main focus of their judgement and therefore has been the main focus of this study. One of, if not the key question, the judges were presented with in the *Gotovina* trial was whether the town of Knin was targeted as such, that is, without any

¹⁵¹ See Expert Report of Richard Higgs dated 12 February 2002.

¹⁵² *Galić* Trial Transcript, 26 July 2002, page 12474.

¹⁵³ *Galić* Trial Judgement, paragraph 396.

¹⁵⁴ Expert Report of Richard Higgs dated 12 February 2002, page 9.

distinction to be made between any possible military objectives and the civilian and civilian objects within the town.

The evidence given by Mrkšić demonstrates the difficulty of the evidence that was being presented to the judges in the Gotovina case. Within a few minutes evidence was presented of intelligence of 'fire transferred on....residential buildings' and then Mrkšić's assessment of the seemingly opposite that

They had to have had a GPS system and a target analysts group because it was so precise. I never asked these gentlemen here what it was they shelled us with. But they continued to shell me, not the town, and that is something which amazed me, because had they continued, they would have finished their job.¹⁵⁵

The Trial Chamber concluded, however, that the HV had at times deliberately fired on civilian objects and areas and that this was 'consistent with the plain text of those orders to put towns under artillery fire, meaning to treat whole towns, including Knin, as targets when firing artillery projectiles during Operation Storm'.¹⁵⁶ As well as the evidence of the locations in which shells had landed, the 'TS-4's reporting of firing at Knin or at the general area of Knin on two occasions on 4 and 5 August 1995, as well as with the 7th Guards Brigade's reports of firing at S-numbered targets on the Ivančića map', this finding that the HV had not complied with the principle of distinction was strongly influenced by the 'impression gained' by the witnesses such as Dreyer, Forand, Bellerose, Hendriks, Gilbert, Liborius, and Stig Marker Hansen 'that the shelling impacted all over Knin and was indiscriminate'.¹⁵⁷

What is interesting here is that the impression that those actually subject to the shelling in Knin seem collectively to have given the trial judges of an indiscriminate bombardment was not passed on to the appeal judges. Despite the extent to which the trial judges had included this evidence in their judgement, the majority of the Appeals Chamber emphasised the seeming caution the Trial Chamber had in relation to this evidence. The majority of the Appeals Chamber found that the trial chamber had viewed the relevant evidence of Dreyer, Forand, Bellerose, Hendriks, Gilbert, Liborius, and Stig Marker Hansen 'cautiously, noting that many witnesses had little artillery training, may have had trouble assessing artillery impacts while under fire, and may have mistaken shelling outside of Knin for shelling inside the town' and that the 'Trial Chamber relied on this evidence only in the context of other findings on the

¹⁵⁵ *Gotovina* Trial Testimony, 18 June 2009, pages 18887, 18889.

¹⁵⁶ *Gotovina* Trial Judgement, paragraph 1911.

¹⁵⁷ *Gotovina* Trial Judgement, paragraph 1911.

record'.¹⁵⁸ The majority of the Appeals Chamber found that on this basis it 'would not be reasonable to rely on these testimonies independent of further supporting evidence'.¹⁵⁹

The civilian witnesses who provided evidence in relation to Knin, and equally, the military witnesses, had had much less time to establish knowledge of the situation than those in Sarajevo. It is apparent that with a shorter military campaign there will be less evidence to show an intention to harm civilians as part of the campaign, if that was in fact the case. There was very little evidence relied on from the civilians themselves in the *Gotovina* Trial Judgement in relation to the shelling of Knin. A significant number of the international military in Knin for the two days it was shelled seemed, however, to have no doubt that fire was being directed at the civilian population and the Trial Chamber took support for their position from this.

Conclusion

The second element of the research question asked how the judges approached and decided on questions of evidence in relation to the law of targeting and what influences were apparent on this, including whether the principle of humanity had a role here. In the demarcation of the law of targeting, establishing what crimes had been committed from an assessment of the evidence before them measured against their legal definitions was at the heart of the judges' work. It was also, however, not a straightforward process.

The absence of direct evidence of the intentions behind those firing the shells and bombs that killed and harmed civilians led to the judges having to consider a substantial amount of indirect evidence of this intention that was available to them, including the effects of the shots fired, to make their decisions. In some cases there was disagreement between the judges as to whether the requirement of proof beyond reasonable doubt had been met.

In this landscape of indirect evidence, there was room for the judges to be guided as to what the intention must have been by those with 'expertise' on the matters before them. The use made of expert witness as such, however, can be seen to be less than problem free. The debate over the question of who in fact shelled Zenica in the case of *Blaškić* was a forerunner to the debates over expert evidence that would be a feature of the *Galić* case. In *Blaškić* the

¹⁵⁸ *Gotovina* Appeal Judgement, paragraph 75.

¹⁵⁹ *Gotovina* Appeal Judgement, paragraph 79.

mathematical calculations of the defence expert were found to be convincing compared to the reasoning of those who had examined the impact point although they could not completely refute the prosecution case. In *Galić*, and in relation to the shelling of Markale Market in particular, the use of expert evidence again could not provide certainty as to the source of the shelling with nothing more. It definitely could not provide evidence as to the intention of those who fired the shot. In the case of *Gotovina* there was an apparent lack of the necessary technical evidence that an expert witness would have been expected to provide, in particular in relation to margins of error of the weapons that were being used and the distinction between the expected margin of error on a first shot and then subsequent ones.

In the absence of expert witnesses providing all the guidance the judges were looking for, it is clear from the trial transcript that the judges were interested in hearing the experiences and opinions of those with military backgrounds. They did not enforce a strict expert/non-expert division in this regard. The judges were strongly guided by the military experience presented to them. They apparently considered that their findings as to the existence of unlawful attacks were in line with a body of military opinion even if this did not always turn out to be the case when their judgments were issued and considered at Appeal.

The *Blaškić* Trial Judges relied on the views of the international military as to the nature of the attacks they were considering and on the level of organisation that must have been behind them. In *Galić* the military witnesses guided the judges as to what the use of artillery around Sarajevo was aimed towards. The *Gotovina* Trial Judges heard a significant amount of testimony from those with military experience that the shelling of Knin could not be reconciled with the principle of distinction. The *Gotovina* Trial Judges did not apparently think their view set out in their judgment was at odds with this. It is, however, inexplicable as to why these trial judges thought the '200m rule' represented the testimony they had before them.

The trial judges also relied on those with lived experience of the conflict even in relation to areas where technical or expert evidence was also presented. The contrast between the evidence witnesses could present in relation to the shelling of Sarajevo and Knin showed the value of the knowledge survivors accumulated through their experience. The findings of this study indicate the importance of civilian and civilian victim witnesses to proving that crimes of unlawful attack have taken place but also in proving who carried out the attacks; the potential sophistication of their knowledge has not previously been discussed and should be

investigated further. The judges clearly gave this evidence an important role, possibly as a part of their perceived role of ensuring the testimony of the victims was heard and recording the experiences of the victims and witnesses to the events under examination at the ICTY.

A common feature of these three cases was that the judges were able to take the evidence obtained by the OTP and come to findings as to whether criminal breaches the laws of war had been committed. Importantly, in showing that a court of law could make factual findings that breaches of the principle of distinction as reflected in API had taken place, even in the difficult evidential situation that will inevitably surround a conflict, they were putting the principle of humanity found within API into action.

The next chapter will turn to the last element of the demarcation of the law of targeting, where the line is finally drawn to demarcate the guilt or innocence of the accused. That is, how the judges approached the criminal responsibility of those commanders charged with targeting offences. It will look to the evidence presented to see what it was that the judges considered sufficient to find responsibility on the part of a commander, that is, not someone who fired, or potentially even directly ordered, the particular shots in question, for targeting offences. The question of indirect, or circumstantial evidence, will again be considered but in the context of finding criminal responsibility as opposed to the existence of criminal acts.

Introduction

This chapter looks at how the judges used the law and evidence to make their findings as to the guilt or innocence of the commanders before them. The question addressed by this chapter is what findings did the judges make in relation to individual criminal liability for acts breaching the law of targeting and, given this, can any influences can be identified regarding the judges' findings as to criminal responsibility of military commanders specifically as it relates to the launching of unlawful attacks?

This chapter seeks to demonstrate the lack of use of convictions on the basis of Article 7(3) of the ICTY Statute regarding command or superior responsibility despite the real difficulty in proving any order has been given to launch an unlawful attack. This in turn translates into a need to rely on circumstantial evidence and therefore a broad consideration of the role and actions of the accused, including their political motivations. It also seeks to show that the ICTY judges did not lose sight of the military viewpoint and they considered that their judgments were always supported by a body of military opinion – even if in places there were strongly opposing views.

Guénaél Mettraux, in *The Law of Command Responsibility*, presents a powerful summary of the role of and standard expected from military commanders:

The right equilibrium thus had to be found between the need to protect the weak and defenceless through adequate efforts on the part of people in authority with a view to prevent and punish crimes whilst accounting for the often grim realities of military command and political leadership. The world does not need saints. It can live with decent men. The law of superior responsibility is not attempting to hold leaders of men to a higher standard than that.¹

Michael Smidt describes the key role of the commander in combat operations being that '[t]he leader is the individual that establishes the command climate - the unit's collective sense of

¹ Guénaél Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), 271-272.

right and wrong'.² The question raised by these points from Mettraux and Smidt is what in fact is legally expected of a 'decent' commander given the power they exercise? The question the judges at the ICTY had to answer goes one step further; at what point does the conduct of a commander become not only not good and proper, but criminal?

As emphasised in Chapter 1 (Introduction), the fact that the Prosecutor of the ICTY had decided to bring cases against military commanders, to ask judges to assess the legality of how they conducted their campaigns – that is, assessing how they did what it is they have been trained to do and do as part of their very existence – is extremely rare and potentially an important precedent. As the early cases at the ICTY were prepared and heard, there was no existing rulebook on what was relevant or not to the prosecution of commanders for acts carried out by their subordinates.

As also mentioned in Chapter 1 (Introduction), findings of the ICTY have always been open to, at the least, the suggestion that they contain judge made law. In the specific context of command responsibility, Mettraux states that '[a] great deal of the law-making activity of international courts and tribunals was necessary to transform the doctrine of command responsibility from an anarchy of sometimes contradictory precedents into a consistent body of law' and points out how little the principle of legality has been considered by the judges in setting out the boundaries of command responsibility.³

After establishing that unlawful attacks had taken place, in *Blaškić* there was a critical and ultimately decisive (given the result of the appeal) question over who exercised command over the individuals carrying out the relevant attacks. The trial chamber, having found that it was Blaškić who was in command, considered whether Blaškić purposefully issued orders that led to the attacks and then, even if not, did he have a duty to investigate and punish the perpetrators and if so, had he done so.

The trial judges in *Galić* set out early on in their judgment that there were two stages to the decision they were required to make. They firstly had to establish 'whether the Prosecution's allegations that SRK personnel committed the criminal acts alleged in the Indictment have been proved beyond reasonable doubt' and secondly, 'what, if any, criminal responsibility

² Michael L. Smidt, 'Yamashita, Medina, and beyond: Command Responsibility in Contemporary Military Operations', *Military Law Review* 164 (2000): 159.

³ Guénaél Mettraux, *The Law of Command Responsibility*, 8-10.

General Galić incurs for any such criminal acts committed by SRK personnel'.⁴ Galić was in fact found guilty, by the majority, pursuant to Article 7(1) of the Statute, that is under individual responsibility rather than command responsibility.

In *Gotovina* it was clear who was carrying out the attacks in question, who their commanders were and who had ordered the attacks take place. The question was what specifically had Gotovina and Markač ordered to be fired at. This ultimately seems to have come down to the content of one specific order that was, however, capable of more than one interpretation and an assessment of the conduct of the shelling that took place. The OTP case was, however, not simply based on a charge of ordering an unlawful attack. Their case was that Gotovina and Markač were individually criminally responsible due to their role in a joint criminal enterprise. A large section of the *Gotovina* Trial Judgement is therefore taken up with evidence relating to the alleged existence of a joint criminal enterprise ('JCE') of which, on any reading, Gotovina and Markač were only a small part or not a part at all. Questions relating to this JCE are discussed later on in this chapter.

Despite the technical legal nature of what responsibility entails, whether or not someone is responsible is again fundamentally a question of evidence or the absence of evidence. This chapter therefore concentrates on the *evidence* that was found sufficient to decide that a commander was criminally responsible for crimes committed in the midst of ongoing hostilities, against the background of the debate over the nature of command responsibility in general and at the ICTY in particular.⁵ It is clear that the evidence of the effects on the ground of a particular artillery shot are only very imperfect evidence of what was in the mind of the person firing and potentially even less of what their commander intended and whether this met any level of criminal responsibility.

Given a lack of evidence of a mental state or intention, what evidence does suffice? William Fenrick states that '[g]enerally speaking, circumstantial evidence will be essential to proving responsibility for persons in superior or command positions.'⁶ This chapter will consider how the judges at the ICTY put this into practice.

⁴ *Galić* Trial Judgement, paragraph 5.

⁵ See the particularly clear overview in Elies van Sliedregt, 'Command Responsibility at the ICTY: Three Generations of Case-Law and Still Ambiguity', *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011).

⁶ William J. Fenrick, 'Gold or Double Standard', Unpublished Article: 11.

It might be obvious, but it is perhaps worth pointing out, that, evidence given in private session apart, the judgements contain the best evidence the judges have had before them, albeit not the totality of evidence. If there is something that seems ambiguous, or cannot be explained, then that is the position that remains. The very purpose of a criminal trial to simply establish guilt or innocence of a particular individual and the partial picture it can present limits the information that it can provide as to the 'personality, motive, and rationale' of the accused.⁷ Whatever the evidence before them, however, the judges have to decide on guilt having been proven 'beyond reasonable doubt'.

In considering what influenced the judges in finding criminal responsibility (or otherwise) of the commanders, this chapter first considers what is required for criminal intention. It then looks to how the judges approached the question of 'ordering' criminal conduct which, given that none of the commanders had physically committed any of the crimes charged, was the main route by which the commanders had potentially incurred individual responsibility. Finally, it looks to the role of evidence of 'agreement' or 'collusion' with the overarching political plan as a factor in a commander's criminal responsibility.

Criminal intention

As William Boothby sets out, the requirements on commanders as to the degree of care they are required to take in launching an attack is not straightforward.⁸ The charges brought against Galić, Blaškić and Gotovina, however, alleged more than a lack of sufficient care; they alleged a criminal intention of the commander behind the criminal acts of targeting carried out by their subordinates.

The term 'command responsibility' used in legal literature is usually a very specific one, referring to a particular means of criminal liability that can be incurred by those in a position of command for actions carried out by their subordinates. This legal doctrine of command (or superior) responsibility was incorporated into the ICTY Statute in Article 7(3).

⁷ Thijs B. Bouwknecht and Adina-Loredana Nistor, 'Studying 'Perpetrators' through the Lens of the Criminal Trial', in *Perpetrators of International Crimes: Theories, Methods, and Evidence*, edited by Alette Smeulers, Maartje Weerdesteijn and Barbora Holá (Oxford: Oxford University Press, 2019), 92, 110-113.

⁸ See Chapter 9 of William H. Boothby, *The Law of Targeting* (Oxford: Oxford University Press, 2012).

It is possible, however, for commanders to incur individual liability through acts of their subordinates in other ways, for example, by ordering or by aiding and abetting the actions of others as included in Article 7(1) of the ICTY Statute. Thomas Henquet puts the situation very clearly when he describes command responsibility in a broad sense, covering the different ways in which a superior may incur responsibility for the conduct of his subordinates, and which is covered by both Articles 7(1) and 7(3) of the ICTY Statute:⁹

Articles 7(1) and 7(3) of the ICTY Statute thus cover distinct modes of command responsibility. Responsibility under Article 7(1) for participation in a crime through a subordinate may be termed “direct command responsibility.” By contrast, failure to act in the face of subordinate criminal conduct results in “indirect command responsibility” or “command responsibility *strictu sensu*” under Article 7(3).¹⁰

This acknowledgement that the potential individual responsibility of commanders is broader than the doctrine of ‘command responsibility’ is a useful one to give, albeit perhaps blindingly obvious once it has been stated. It also needs to be kept in mind to establish exactly what ‘command responsibility’ is being discussed at any time. The idea of ‘command’, however, remains a key concept even when considering Article 7(1) responsibility of commanders.

In the three cases under consideration, it is the Article 7(1) individual responsibility that was the key charge against the commanders. Henquet describes a preference by the judges right from the start of the work of the ICTY for convictions to be made under Article 7(1) rather than Article 7(3), emphasising the individual responsibility of those in command, the criminal nature of their own actions rather than those of their subordinates.¹¹ Harmen Van der Wilt also cites this reason that Article 7(1) ‘better reflected the involvement and culpability of the accused’ for the lack of Article 7(3) convictions, given that ‘[one] might have expected that superior responsibility would have abounded in the case law of the ICTY to sustain the conviction of military commanders’. Van der Wilt provides some other potential explanations as being the difficulty in proving command responsibility this long after the events in question and perhaps a reluctance on the part of the judges to convict for such serious crimes on the basis of ‘had

⁹ Thomas Henquet, ‘Convictions for Command Responsibility Under Articles 7(1) and 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia’, *Leiden Journal of International Law* 15, no. 4 (2002): 805-806.

¹⁰ Henquet, ‘Convictions for Command Responsibility Under Articles 7(1) and 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia’, 806.

¹¹ Henquet, ‘Convictions for Command Responsibility Under Articles 7(1) and 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia’, 818-819. Henquet states here that ‘it is interesting to observe how Tribunal Judges have often dealt with the relationship between Article 7(1) and Article 7(3) in terms of policy, logic or reason, rather than law...’.

reason to know', potentially an omission or less than definite intent.¹² Gideon Boas, James Bischoff and Natalie Reid point out (in relation to convictions on the basis of JCE) a 'visceral desire to label the accused a 'committer' of the crime in question, as if that label carried with it a special stigma that the other forms of responsibility lack'.¹³

Boas, Bischoff and Reid also highlight the *Blaškić* Appeal Chamber's finding that where criminal responsibility is charged for the same conduct under both Article 7(1) and 7(3) the judges must enter a conviction under Article 7(1). They conclude, however, that this is an unnecessary and unhelpful limitation on the ability of trial judges to determine the most appropriate form of responsibility of the accused.¹⁴

None of the commanders in the cases in question here was found guilty of carrying out unlawful attacks solely under Article 7(3) ICTY Statute. *Blaškić* was initially found guilty pursuant to Article 7(1) and 'in any event' found to meet the conditions of Article 7(3) although this was overridden on appeal, *Galić* was found guilty pursuant to Article 7(1) and *Gotovina* and *Markač* were also initially found guilty pursuant to Article 7(1) through participation in a joint criminal enterprise, also overridden on appeal.

Daniel Heilmann describes *Galić* as a 'borderline case'; what seemed like a classic case of command responsibility brought under Article 7(1) through circumstantial evidence that *Galić* had ordered the crimes. He states

Ultimately the question at the heart of the issue concerns the point at which the superior has such effective control over his troops and their actions that it amounts to control over the crime itself (which is perpetrated on the ground by his subordinates). If a critical threshold is crossed (e.g. by an omission that amounts to facilitation), the superior himself may become an indirect (co-)perpetrator of the crime.¹⁵

Given this description of the importance placed on Article 7(1) for the responsibility of commanders, this chapter therefore (and contrary to expectations at the start of this research)

¹² Harmen van der Wilt, 'Srebrenica: On Joint Criminal Enterprise, Aiding and Abetting and Command Responsibility', *Netherlands International Law Review* 62, no. 2 (2015): 240.

¹³ Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2008), 421.

¹⁴ Boas, Bischoff and Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*, 423-424.

¹⁵ Daniel Heilmann, 'Guénaël Mettraux. The Law of Command Responsibility', *European Journal of International Law* 21, no. 2 (May 2010), 487-488.

concentrates in particular on how the judges found individual responsibility under Article 7(1). This can be found to be incurred in several ways, or 'modes' in addition to actually having physically carried out the act in question. This includes planning, instigating or ordering a crime and aiding and abetting in the execution of a crime as well as through participation in a joint criminal enterprise ('JCE'). Each of the modes has been defined by the ICTY judges but the key mode for commanders is through 'ordering' whose definition and application will be considered in detail below.

In considering the guilt or innocence of military commanders, the judges were inferring responsibility from principles of the 'qualities' of a chain of command. That is, the commanders in question were not firing the artillery but by virtue of their position they were responsible for those who were and were in a position to give orders and expect to have them obeyed, to decide where the troops, guns and mortars were deployed and providing ammunition.

One point to note is that although the judges at the ICTY use the terms '*mens rea*' and '*actus reus*' in setting out the requirements for criminal responsibility other than as a direct perpetrator, it is not in fact correct to describe them in this way. As is stated at the very start of the practitioner volume 'Forms of Responsibility in International Criminal Law', discussions of whether a commander is liable for a crime they did not physically commit is the attribution of responsibility for the crime through a means other than commission of the crime. This attribution of responsibility does not require a *mens rea* or *actus reus* and the ICTY judgments have created some confusion by referring to these terms in this context. It is only the underlying criminal act that is defined by its *actus reus* and *mens rea*.¹⁶

This is an important distinction as concerns commanders' responsibility for questions of targeting as it means that there is a differentiation between their liability and that of those firing the shots. The question is not whether they committed the crime of unlawful attack but whether they ordered it and therefore hold some criminal responsibility for its commission.

There are, however, still mental/intent and physical/participation requirements for criminal responsibility to be found. One interesting factor for the purpose of the cases under consideration was that a criminal order could be given with 'direct intent' (an intention that a

¹⁶ Boas, Bischoff and Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*, 4-5.

crime ordered be committed) or ‘indirect intent’ (awareness of ‘the substantial likelihood that a crime would be committed as a consequence of’ the order given).¹⁷ How the judges applied this criminal intention is the focus of the next section.

Criminal Intention for ‘ordering’

Blaškić was charged with having ‘together with members of the HVO, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of unlawful attacks on civilians and civilian objects and wanton destruction not justified by military necessity in the following cities, towns and villages, and, or in the alternative, knew or had reason to know that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof....’, that is on the basis of both Article 7(1) and 7(3) responsibility.¹⁸

The *Blaškić* Trial Chamber held that the relevant criminal intent for ordering a crime was that the accused ‘directly or indirectly intended that the crime in question be committed’.¹⁹ Interestingly they highlighted the *Akayesu* Trial Chamber opinion that there ‘is no requirement that the order be in writing or in any particular form; it can be express or implied. That an order was issued may be proved by circumstantial evidence’.²⁰ The *Blaškić* Trial Chamber also stated that ‘an order does not need to be given by the superior directly to the person(s) who perform(s) the actus reus of the offence’, stating that it was ‘irrelevant whether the illegality of the order was apparent on its face’ as it was the mens rea of the commander, not subordinate following the order, that was important.²¹

Blaškić was found to have ‘ordered the attacks that gave rise to these crimes’ and to have been negligent about or given orders while ‘intentionally [taking] the risk that very violent crimes would result’ or that he ‘had to have known that... extremely violent crimes would necessarily result’ in the case of the others.²² These confusing pronouncements on the requisite mens rea for ordering a crime with less than direct intent were overridden by the

¹⁷ Boas, Bischoff and Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*, 344.

¹⁸ *Blaškić* Second Amended Indictment dated 25 April 1997, paragraph 8.

¹⁹ *Blaškić* Trial Judgement, paragraph 278.

²⁰ *Blaškić* Trial Judgement, paragraph 281.

²¹ *Blaškić* Trial Judgement, paragraph 282.

²² *Blaškić* Trial Judgement, paragraphs 495, 531, 562, 592 and 661.

Appeals Chamber. They established the requirement for the ‘awareness of the substantial likelihood that a crime will be committed in the execution of that order’.²³

Galić was charged with ‘individual criminal responsibility for planning, instigating, ordering, committing, or otherwise aiding and abetting, in the planning, preparation or execution of the campaign of shelling and sniping against the civilian population of Sarajevo and the acts set forth below by the forces and persons under his command, pursuant to Article 7(1) of the Statute of the Tribunal’ as well as for responsibility pursuant to Article 7(3).²⁴ The prosecution had narrowed the emphasis to ‘ordering’ by the time of writing their Final Trial Brief.²⁵

The majority of the *Galić* Trial judges in explaining the differences between the potential Article 7(1) and 7(3) liability emphasised that ‘the key point in all of this is that a superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions or apparent omissions or understated participation or any mixture of overt and non-overt actions, where the effect of such conduct is to commission crimes by subordinates’.²⁶ This is clearly aimed at the particular situation of Galić where there was little evidence of what his participation involved. They noted that Galić would have been aware of regulations ‘concerning the application of the laws of war to the armed forces of the SFRY’ which provided for responsibility as an instigator or participant for a commander who allowed his subordinates to continue to commit violations of the laws of war, which the judges conclude translates to Article 7(1) type liability.²⁷

With an obvious eye again to the type of evidence they had before them, the judges state that ‘Proof of all forms of criminal responsibility can be given by direct or circumstantial evidence’²⁸ and go on to give the example that ordering (emphasised by the Prosecution in its Final Trial Brief):

²³ *Blaškić* Appeal Judgement, paragraph 42:

The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.

²⁴ *Galić* Indictment dated 26 March 1999, paragraphs 10-11.

²⁵ *Galić* Trial Judgement, paragraph 167.

²⁶ *Galić* Trial Judgement, paragraph 169.

²⁷ *Galić* Trial Judgement, paragraph 170.

²⁸ *Galić* Trial Judgement, paragraph 171.

may be inferred from a variety of factors, such as the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops, the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of operations, the modus operandi of similar acts, the officers and staff involved, the location of the superior at the time and the knowledge of that officer of criminal acts committed under his command.²⁹

The judges set out that the ‘requisite mens rea for all forms of participation under Article 7(1) is that the accused “acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.”’ They also set out that the ‘mens rea of the accused need not be explicit but may be inferred from the circumstances’.³⁰

The judges were willing to look at the difference between *de jure* and *de facto* command and ensure that the accused was, in fact, the commander exercising command power, and, further, whether this was actually ‘effective’ power.³¹ In considering the ‘Effectiveness of the Command and Control of the Chain of Command’ the Galić trial judges specifically consider the following elements of the chain of command:

- (a) The Structure of the SRK
- (b) The Reporting and Monitoring Systems of the SRK
- (c) Was the SRK Personnel under Strict Control?
 - (i) Procedure for Instructions and Orders
 - (ii) Control over Sniping Activity
 - (iii) Control over Shelling Activity
 - (iv) Control over SRK Weaponry
- (d) Was General Galić in a Position to Punish his Subordinates?³²

In this section of the *Galić* Trial Judgement, the judges emphasised the ‘functioning’ chain of command, the strength of the ‘hierarchy’ and the military professionalism seen by the witnesses, of whom there were many present and former members of various armed forces.³³

²⁹ *Galić* Trial Judgement, paragraph 171.

³⁰ *Galić* Trial Judgement at paragraph 172. For authority for this point the judges cite the *Čelebići* Trial Judgement at paragraph 328 which in turn cites the *Tadić* Trial Judgement at paragraph 676. Paragraph 676 of the *Tadić* Trial Judgement cited the jurisprudence of two of the Subsequent Nuremberg Trials including that of the *Justice* Case which noted that ‘knowledge and intent can be inferred from the circumstances’.

³¹ For example, see *Galić* Trial Judgement at paragraph 606 onwards.

³² *Galić* Trial Judgement, paragraph 614 onwards.

³³ *Galić* Trial Judgement at paragraphs 615-617 in particular.

The forms and means of communication (in the broadest sense) were also important.³⁴ In terms of Galić's control over the shelling activity, the judges set out evidence regarding the level of coordination involved, the authorisation that must have been required for the amount of ammunition used and the links between periods of particularly frequent or infrequent shelling to broader political events which implied the shelling was used as a means by Galić and his superiors to bring pressure on the Sarajevo political leaders.³⁵

Galić would really have had to have been actively oblivious, as well as having some form of agreement between his subordinates not to tell him anything about what was happening, and he would have had to forget anything directly told to him, for him not to have knowledge of what was happening.³⁶ There is clearly a further important step required for a finding that Galić was responsible for 'ordering' what happened. The discussion of Article 7(1) liability in this case shows the judges were thinking about the breadth of the evidence they could accept to show the required awareness and, that there was a majority finding here, demonstrates that there were fundamental disagreements even regarding the legal details of the basis on which Galić could be convicted.

The *Galić* Trial Judges considered Galić's place in the overall political and military structure, considering those above, next to and below him in the chain of command, although they do not provide great detail on this. They did not find him to be 'the unique architect of that campaign'³⁷ and in the section specifically on Galić's liability, it was found that

In sum, the evidence impels the conclusion that General Galić, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) failed to prevent the commission of crime and punish the perpetrators thereof upon that knowledge, furthered a campaign of unlawful acts of violence against civilians through orders relayed down the SRK chain of command and that he intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo. The Majority finds that General Galić is guilty of having ordered the crimes proved at trial.³⁸

Gotovina and Markač were charged, 'in addition or alternatively' to their participation in a Joint Criminal Enterprise ('JCE') with 'individual criminal responsibility under Article 7(1) of the

³⁴ *Galić* Trial Judgement, paragraphs 618-628.

³⁵ *Galić* Trial Judgement, paragraphs 637-652.

³⁶ See, for example, *Galić* Trial Judgement at paragraphs 618-623.

³⁷ *Galić* Trial Judgement, paragraph 747.

³⁸ *Galić* Trial Judgement at paragraph 749

Statute pursuant to the modes of liability of committing, planning, instigating, ordering, and/or aiding and abetting the planning, preparation, and/or execution of the crimes charged’ as well as under Article 7(3).³⁹ The nature of JCE criminal liability is described in more detail in section 5.3 below.

The *Gotovina* Trial Judges summarised the requirements for liability for ordering as:

1959. Ordering. Liability may be incurred by ordering the principal perpetrator to commit a crime or to engage in conduct that results in the commission of a crime. The person giving the order must, at the time it is given, be in a position of formal or informal authority over the person who commits the crime. The person giving the order must intend that the crime be committed or be aware of the substantial likelihood that the crime would be committed in the execution of the order.⁴⁰

The trial judges, however, found Gotovina and Markač liable pursuant to the mode of liability of JCE. It was found that Gotovina’s order ‘to unlawfully attack civilians and civilian objects amounted, in and of itself, to a significant contribution to the JCE’ and that he ‘intended that his actions contribute to the JCE’.⁴¹ The trial judges did not find it necessary to come to any conclusions on the other modes of liability alleged in the indictment.⁴² The *Gotovina* Trial Chamber found that

considering the nature of his conduct and in particular the unlawful attack, the Trial Chamber finds that Gotovina knew that there was a widespread and systematic attack against a civilian population and that his acts were part of that attack.... the Trial Chamber finds that Gotovina had the state of mind that the crimes forming part of the objective should be carried out.⁴³

Markač was found to have ordered unlawful attacks on Gračac as well as having taken no action to prevent or to report or punish crimes committed by those under his control in Gračac on 5 and 6 August 1995. The Trial Judges made the same findings regarding Markač’s contribution to the JCE as for Gotovina.⁴⁴

³⁹ *Gotovina* Trial Judgement at paragraphs 1955, 1961.

⁴⁰ *Gotovina* Trial Judgement at paragraph 1959 citing the *Kordić and Čerkez* Appeal Judgement, paragraphs 28-30; *Galić* Appeal Judgement, paragraph 176; *Nahimana et al.* Appeal Judgement, paragraph 481, *Semanza* Appeal Judgement, paragraph 361, *Milošević* Appeal Judgement, paragraph 290, *Boškoski and Tarčulovski* Appeal Judgement, paragraphs 160, 164, *Kalimanzira* Appeal Judgement, paragraph 213 and *Blaškić* Appeal Judgement, paragraph 42 – demonstrating the depth of authority that had been accumulated on this definition.

⁴¹ *Gotovina* Trial Judgement, paragraph 2370-2371, 2375.

⁴² *Gotovina* Trial Judgement, paragraph 2375.

⁴³ *Gotovina* Trial Judgement, paragraphs 2370-2371.

⁴⁴ *Gotovina* Trial Judgement, paragraphs 2581-2583.

The Appeals Chamber concluded, by a majority, that the Trial Chamber had been wrong. They held that the artillery attacks ordered by Gotovina and Markač could not be found beyond reasonable doubt by a reasonable trier of fact to have been unlawful. In consequence they found that there had not been a JCE of which they were a part ‘to permanently remove the Serb civilian population from the Krajina by force or threat of force’.⁴⁵ By a majority, they found no grounds to enter a conviction under any alternate mode of liability for both Gotovina and Markač.⁴⁶

The outcome of the ICTY jurisprudence is to make it clear that someone who gives an order where there is a substantial likelihood that a crime would be committed in the execution of the order will be criminally liable for that order (as well as where they have directly ordered a crime be committed). This level of intent has been seen to draw on a recklessness standard which requires at the least an awareness that the crime will probably occur.⁴⁷ This can be compared to the *mens rea* required for someone to have been found to have committed the crime of unlawful attack which is that they have to have done so ‘wilfully’. This standard is drawn directly from the IHL standard set out in Article 85 API and its ICRC Commentary and has been specifically accepted to encompass recklessness.⁴⁸

Orders

Following on from the previous section which set out the importance of ‘ordering’, as opposed to command responsibility, as a means of criminal responsibility for unlawful attacks in these cases, this section considers how the judges approached the evidence they were presented with of the orders given by the accused. It will demonstrate that there was a real question in all the cases over whether orders to launch unlawful attacks had been given by the accused.

This chapter will first look at the interpretation of orders that were in evidence before the judges - various ‘defensive’ orders interpreted as ‘attack’ orders by the judges in *Blaškić* and

⁴⁵ *Gotovina* Appeal Judgement, paragraphs 83-84, 96.

⁴⁶ *Gotovina* Appeal Judgement, paragraphs 99-136, 137-157.

⁴⁷ Boas, Bischoff and Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*, 350.

⁴⁸ *Galić* Trial Judgement, paragraph 54, *Galić* Appeal Judgement, paragraph 140.

key orders to attack in *Gotovina*. It will then consider the inference of the existence of unlawful orders (even in the presence of orders to comply with IHL) in the case of *Galić*.

Interpretation of orders

In *Blaškić* there was a real question of what technical/de jure command of an area/territory translated to in terms of actual effective control over what was happening in it and how this translated to criminal responsibility or not. Blaškić's orders were used as evidence of his power of command over particular units.⁴⁹ The judges also considered the views of independent observers, an order from Blaškić's own superiors and evidence of the 'frequency of the meetings between the accused and the commander of the Vitezovi'.⁵⁰

The scope of Blaškić's criminal responsibility was also mainly determined by the interpretation of orders he had given presented in evidence to the judges. This includes information obtained from the orders as to who was under his command as well as what he was asking them to do.⁵¹ In the *Blaškić* Trial Judgement the judges concluded, for example, that those who had carried out the lorry bombing of 18 April 1993 in Stari Vitez had been under Blaškić's command and could not have carried out the attacks without his orders, in particular given that he was the only person who could have authorised the use of the explosives used in the bombing.⁵² This implication drawn from circumstantial evidence of authority over military resources was also raised in the context of control of artillery in the *Galić* case.⁵³

The *Blaškić* Appeal Chamber in fact agreed that 'the Trial Chamber's finding that the Appellant was in control of explosives in the Vitez factory and that he was therefore responsible for the lorry bombing could have been reasonably reached on the basis of trial evidence'. They also noted, however, that this was circumstantial evidence only and that it was contradicted by new evidence that had been admitted on appeal.⁵⁴

⁴⁹ *Blaškić* Trial Judgement, paragraphs 519-525.

⁵⁰ *Blaškić* Trial Judgement, paragraphs 526-528.

⁵¹ See, for example, *Blaškić* Trial Judgement, paragraphs 433-495.

⁵² *Blaškić* Trial Judgement, paragraph 530.

⁵³ *Galić* Trial Judgement, paragraphs 653, 697-699.

⁵⁴ *Blaškić* Appeal Judgement, paragraphs 448-455, which included the following:

448. The Appeals Chamber notes that the explosion did not take place in the centre of Stari Vitez, and that the casualties included three soldiers and four civilians. However, the Appeals Chamber cannot fail to note that no evidence was cited by the Trial Chamber that the Appellant

The 'gaps' in the documentation provided were noted by the judges.⁵⁵ Within the orders they did have before them, Blaškić was also seen to have shown the position he had adopted on the broader political picture, including elements that were seen to be incitement to commit crimes, not professional military instructions. These terms were also, however, subject to debate as to their correct interpretation, as can be seen from the discussion as to the meaning of 'mop-up' operations below.⁵⁶

In relation to the attack on Ahmići, Blaškić denied that he had ordered the attack. Blaškić's defence provided three orders he had given just before the time of the attack and described these as orders to take a defensive position.⁵⁷ The Trial Chamber did not interpret these orders in line with Blaškić's arguments and nor did they take them at face value. They in fact found that the third order (D269) was an order to carry out an attack and in fact it was the order for the attack that did take place.⁵⁸ Having noted that there was no evidence that there was an imminent attack that would justify Blaškić's order to attack, which becomes key in the appeal,

ordered the bombing, and that the Trial Chamber convicted him for ordering the bombing on the basis of circumstantial evidence. Before concluding on this part of the appeal, the Appeals Chamber will briefly examine two additional arguments raised by the Appellant.

....

454. The Appeals Chamber considers that the Trial Chamber's finding that the Appellant was in control of explosives in the Vitez factory and that he was therefore responsible for the lorry bombing could have been reasonably reached on the basis of trial evidence. However, additional evidence does show that explosives were available in the region to all sides of the conflict, and that the HVO did not have sole control over the factory that produced explosives. The Appeals Chamber considers that the trial and additional evidence do not satisfy it beyond reasonable doubt that the explosives used for the lorry bombing of 18 April 1993 could not be secured without the authorization of the Appellant.

⁵⁵ See, for example, *Blaškić* Trial Judgement, paragraphs 588-589.

⁵⁶ *Blaškić* Trial Judgement at paragraph 646:

Based only on the text, the Trial Chamber notes that the accused used particularly clear terms in entrusting the commander of the Ban Jelašić Brigade with an attack mission. He gave the order to "engage in the blockade of Višnjica and other villages" and to "take control of" or "capture" Gomionica and Svinjarevo. Despite the contention of the Defence, the terms used do not suggest that General Blaškić ordered the commander to capture only the ABiH positions allegedly located in the towns. On the contrary, the eighth paragraph implied that his task went well beyond that. The accused employed radical words in the order which have connotations of "eradication": "All assault operations must be successful and to that end, use units of the Military Police and civilian police for the mopup".

⁵⁷ *Blaškić* Trial Judgement, paragraph 432.

⁵⁸ *Blaškić* Trial Judgement, paragraph 437.

they then asked whether ‘the troops acted beyond the accused’s orders’⁵⁹ and looked to establish whether Blaškić had ordered an attack against the Muslim population.⁶⁰

In order to do this the judges first looked to establish the control that Blaškić exercised over the various military units that they had found to be involved in the attack. They then went back to the question of whether the crimes committed by these forces had been ordered, finding that the scale and coordination of the crimes committed meant that they had to have been ordered by ‘a single command, which accordingly could only be superior to the commander of each of those units’.⁶¹

The judges then go back to the contents of Blaškić’s order and consider that it was designed to incite racial hatred and therefore presumably to prompt those under his command to commit crimes against the Muslim population. Under the heading ‘The Content of the Orders’ the judges compared the evidence of what happened on the ground to what was contained within the orders, noting that the ‘orders recommend the modes of combat that were actually used on the ground on 16 April’ including, for example, the mention of ensuring control over fuel consumption and using blocking (observation and ambush), search and offensive forces which correlated with the use of petrol weapons and the ethnic cleansing tactics used on the ground.⁶² They mention the use of artillery which was, according to Blaškić, specifically under his direct command.⁶³

⁵⁹ *Blaškić Trial Judgement*, paragraph 438.

⁶⁰ *Blaškić Trial Judgement*, heading III B. 1. d) iii) ‘The accused ordered an attack aimed at the Muslim population’.

⁶¹ *Blaškić Trial Judgement*, paragraph 467:

iv) The massive and systematic nature of the crimes as proof that they were committed on orders 467. Lastly, the idea that these crimes could have been committed by uncontrolled elements is impossible to reconcile with the scale and uniformity of the crimes committed on 16 April in the municipality of Vitez. The Trial Chamber adopts the opinion expressed by witness Morsink, a professional soldier acting as an observer for the ECMM at the material time:

I believe that one or two minor cases may have been committed by small, uncontrolled groups, but the large-scale and systematic manner in which these events took place, entire villages being burned, and other villages, we saw that it was the Muslim houses that were systematically selected, and we saw that the same type of events were taking place at the same time period in different locations, and it would be impossible, in my opinion, for this to have been carried out by uncontrolled groups.

The planned nature and, in particular, the fact that all these units acted in a perfectly coordinated manner presupposes in fact that those troops were responding to a single command, which accordingly could only be superior to the commander of each of those units.

⁶² *Blaškić Trial Judgement*, paragraph 470.

⁶³ *Blaškić Trial Judgement*, paragraph 471.

The judges also highlighted the testimony of some of the victims who heard those carrying out the massacres referring to doing so on orders. One of these witnesses, Witness A, 'said that he heard a person named Cicko speak in these terms with regard to the events of 16 April: "everyone is washing their hands now as regards Ahmići, but we all know that Blaškić has ordered that no prisoners of war were of interest to him, only dead bodies"'.⁶⁴ This is, however, the only reference to an unambiguously criminal order from Blaškić related to the crimes in Ahmići. The fact that the judges cited it is evidence that they put some weight on it, however, they do not comment on it or use it any further as evidence of direct criminal orders issued by Blaškić.

The judges then proposed an alternative means by which Blaškić would be individually responsible for the massacre even if he had not directly ordered it, namely through recklessness:

Even if doubt were still cast in spite of everything on whether the accused ordered the attack with the clear intention that the massacre would be committed, he would still be liable under Article 7(1) of the Statute for ordering the crimes. As has been explained above, any person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) so as to incur responsibility for having ordered, planned or incited the commitment of the crimes.⁶⁵

The Appeals Chamber completely overturned the Trial Chamber's findings in relation to Blaškić's order D269.⁶⁶ This included the finding that there was no proven 'awareness on the part of the Appellant of a substantial likelihood that crimes would be committed in the execution of D269'.⁶⁷ They did this on the basis of the evidence produced in the original trial as well as additional evidence provided for the appeal. Their key reasons were given as:

- 'the Trial Chamber interpreted the instructions contained in D269 in a manner contrary to the meaning of the order'.⁶⁸

⁶⁴ *Blaškić* Trial Judgement, paragraph 472.

⁶⁵ *Blaškić* Trial Judgement, paragraph 474.

⁶⁶ *Blaškić* Appeal Judgement, paragraphs 332-348.

⁶⁷ *Blaškić* Appeal Judgement, paragraph 347.

⁶⁸ *Blaškić* Appeal Judgement, paragraph 330.

The implication in the following paragraphs, although they do not specifically say so, is that the Appeals Chamber found that this order should be taken at face value.⁶⁹ This is in part because of the following reasons:

- There was a legitimate military objective present in the area and D269 was a justified and legal order in response to the military situation.

(The presence of the ABiH forces linked with the fact that Blaškić did in fact have reason to believe that they intended to launch an attack in the relevant area – shown by the additional evidence produced for the appeal.)⁷⁰

- The lack of any evidence that Blaškić issued D269 with the clear intention that a massacre would be committed or that the crimes that were committed were done so in response to this order.⁷¹

This last point is particularly interesting as it highlights the Appeals Chambers' view that there was a lack of any proof of Blaškić's intention for crimes to be committed but also that there was no evidence that the crimes were committed in response to Blaškić's orders; a causal link was missing. The Trial Chamber had found Blaškić criminally responsible based in large part on the strength of the principle of command and the evidence they had of the chain of command. This was fundamentally challenged in the new evidence presented to the Appeals Chamber and, in particular, that which demonstrated that other people had in fact planned and ordered the commission of crimes in the Ahmići area.

An important note arises, however, from Judge Weinburg de Roca's strong partial dissent. She pointed out that the Appeals Chamber did not conclude on how the participation of others in the planning and ordering of the attack on Ahmići affected the role played by Blaškić and that

⁶⁹ *Blaškić* Appeal Judgement, paragraph 330:

The Appeals Chamber considers that the Trial Chamber interpreted the instructions contained in D269 in a manner contrary to the meaning of the order. Even though the order was presented as a combat command to prevent an attack, the Trial Chamber concluded that it was part of an offensive strategy because "no military objective justified the attack" and in any event it was an "order to attack."

⁷⁰ *Blaškić* Appeal Judgement, paragraphs 333-335.

⁷¹ *Blaškić* Appeal Judgement, paragraph 334.

There is no legal requirement that a person giving orders be a sole decision-maker or be the highest or only person in a chain of command. It is entirely possible that a commander, who is himself acting on the orders of a hierarchical superior, or who is acting in concert with, or at the behest of other political or military leaders, may nevertheless be criminally responsible for ordering crimes.⁷²

The *Blaškić* Trial and Appeal Judgements show the limits of inference from and interpretation of orders. In the case of *Blaškić* an alternative explanation was presented at appeal for the events that occurred that the judges accepted meant that the orders he gave were not unlawful and were not the cause of the crimes that took place. The Appeals Chamber preferred this alternative explanation including, in particular, because of additional information they had been presented with as to the potential military objectives in the area (giving *Blaškić*'s orders a legitimate purpose) and the commanding roles of others that linked them, and not *Blaškić* to the crimes that took place in the villages of the Lašva Valley.

The Trial Chamber in *Gotovina* found that he ordered an unlawful attack based in part on exhibit P1125, an Offensive Operation Order by Ante Gotovina, dated 2 August 1995. Alongside other orders to attack the enemy forces, the Trial Chamber set out that:

Gotovina tasked all artillery-rocket groups with providing artillery support to the main forces in the attack operation, through powerful strikes against the enemy's front line, command posts, communications centres, and artillery firing positions and by putting the towns of Drvar, Knin, Benkovac, Obrovac, and Gračac under artillery fire.⁷³

The controversial phrase here was 'by putting the towns of Drvar, Knin, Benkovac, Obrovac, and Gračac under artillery fire'. This sentence is one of the key pieces of evidence for the Trial Chamber's finding of guilt against Gotovina. This was again the Trial Chamber interpreting an order and finding certain of its contents to be an order for an unlawful attack. There was also a clear potentially legal interpretation that the judges could have accepted. This was namely that set out by Marko Rajčić, chief of artillery of the Croatian forces during Operation Storm, that the order was to fire at pre-set legally vetted targets within the named towns.⁷⁴ The judges had also heard testimony from the experts on the meaning of this order and its potential interpretation, with the expert witness Geoffrey Corn allowing that there was more than one potential interpretation, one, however, being that the 'order could be read as a high-level

⁷² *Blaškić* Appeal Judgement, Partial Dissenting Opinion of Judge Weinberg de Roca, paragraphs 40-41.

⁷³ *Gotovina* Trial Judgement, paragraph 1185.

⁷⁴ *Gotovina* Trial Testimony 18 February 2009 – 23 February 2009 summarised in *Gotovina* Trial Judgement at paragraphs 1177-1184.

order in a broader context to strike previously identified targets within Knin as tactical support'.⁷⁵

The trial judges found that given the partial evidence they had in terms of pre-set artillery targets and contemporaneous artillery reports, the only evidence they could rely on was the evidence they had of where (some of) the shells had in fact landed. They assessed that some of these shells had been deliberately fired at areas with no military objectives (a not uncontroversial process – as described in Chapter 5 (Evidence II: Finding criminal intent)). They concluded that this deliberate firing at areas in Knin which were 'devoid of military targets' was consistent with the 'plain text of those orders to put towns under artillery fire', that is to treat the whole town as a target.⁷⁶ They stated that this was supported by the (very limited) firing reports they had seen, the 'general impression gained by several witnesses present in Knin during the attack' and the finding of the 'insufficient regard paid to the risk of civilian casualties and injuries and damage to civilian objects in the disproportionate firing at two locations where the HV believed Martić to have been present'.⁷⁷

The Appeals Chamber found, by a majority, that the Trial Chamber's 'impact analysis' of where the shells had been targeted was 'erroneous' and that it was 'at the very core of' the finding that the artillery attacks on the towns were indiscriminate.⁷⁸ They noted that neither of the expert witnesses Konings or Corn suggested that the only interpretation of the order to attack the towns was that it was an order to indiscriminately attack.⁷⁹ They concluded that:

Given that the relevant portion of the 2 August Order was relatively short, and did not explicitly call for unlawful attacks on the Four Towns, the text of the 2 August Order could not, alone, reasonably be relied upon to support a finding that unlawful artillery attacks took place.⁸⁰

The fact that the 'impact assessment' the trial judges conducted was found to be incorrect meant that their finding that Gotovina had issued an unlawful order to attack Knin fell away and with it any finding of criminal responsibility pursuant to JCE or otherwise; the terms of the order itself were found by the appeal judges to be insufficient to support a finding that Gotovina had ordered an unlawful attack.

⁷⁵ Summarised in *Gotovina* Trial Judgement at paragraphs 1172-1173.

⁷⁶ *Gotovina* Trial Judgement, paragraph 1911.

⁷⁷ *Gotovina* Trial Judgement, paragraph 1911.

⁷⁸ *Gotovina* Appeal Judgement, paragraph 77.

⁷⁹ *Gotovina* Appeal Judgement, paragraph 77.

⁸⁰ *Gotovina* Appeal Judgement, paragraph 77.

Inference of existence of unlawful orders

A striking difference between the case of *Galić* and those of *Blaškić* and *Gotovina* is that there was no evidence presented of the terms of any specific order by Galić to attack anywhere in Sarajevo. The nearest that the judgement could include was an admission by Galić to one of the witnesses, UN representative Hussein Abdel-Razek, that 'civilians who crossed the airport tarmac were targeted because he had doubts that those movements might be for military purpose'.⁸¹ The trial judges also cited the evidence of Witness AD, 'a member of the SRK forces, who testified that he confronted his superiors over orders to target civilian places at his brigade command headquarters and that his brigade commander threatened to punish him and the other members of his unit'.⁸² This evidence, however, falls some way from demonstrating the contents of the orders constituting the orchestrated campaign against civilians in Sarajevo that was found to have existed.

The majority of the Trial Chamber *inferred* from the evidence that Galić 'furthered a campaign of unlawful acts of violence against civilians through orders relayed down the SRK chain of command and that he intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo' and that therefore he was liable pursuant to Article 7(1), that is individually liable for ordering the crimes that were found to have taken place.⁸³ They stated that

....According to the Majority, there is an irresistible inference to be drawn from the evidence on the Trial Record that what the Trial Chamber has found to be widespread and notorious attacks against the civilian population of Sarajevo could not have occurred without it being the will of the commander of those forces which perpetrated it and that the lack of measures to prevent illegal sniping and shelling activities was deliberate.⁸⁴

The facts that led to this inference can be summarised as:

- The strength of the SRK chain of command.

⁸¹ *Galić* Trial Judgement, paragraph 743.

⁸² *Galić* Trial Judgement, paragraph 744.

⁸³ *Galić* Trial Judgement, paragraphs 749-750.

⁸⁴ *Galić* Trial Judgement, paragraph 742.

- The fact that the level of fire into the city was reduced in response to cease-fire agreements or after complaints were made, which demonstrated that the fire had been carried out in line with the Bosnian Serb chain of command in the first place.
- The increase in fire following threats made by the Bosnian Serb military to the effect that it would increase if certain demands were not met.
- The highly coordinated nature of some of the indiscriminate attacks.
- The length of time for which crimes against civilians were committed must have been the result of deliberate action for them to continue.
- Galić's stated agreement with the plan of his military and political superiors.⁸⁵

Not all the judges considered that there was sufficient evidence to find that Galić had ordered the crimes in question. Judge Nieto-Navia in fact considered that the evidence supported the conclusion that Galić did not order attacks against civilians:

For example, he personally instructed his troops in writing to respect the Geneva Conventions and other instruments of international humanitarian law. This written evidence echoes the testimonies of 16 SRK soldiers and officers posted throughout Sarajevo during the Indictment Period, who confirmed that they had received orders not to target civilians. Furthermore, the Accused launched internal investigations on at least two occasions when alerted by UN representatives about possible attacks on civilians by his forces.⁸⁶

Judge Nieto-Navia pointed out that the majority had misrepresented the evidence given by UN representative Hussein Abdel-Razek in relation to the shooting of those crossing the airport:

The Accused's "admission" therefore related to his attempt to stop the "activities" for "military purposes" taking place at the airport, which the SRK had voluntarily placed under the control of the UN to ship humanitarian supplies but which was misused to allow enemy soldiers, some dressed as civilians, to enter the city.⁸⁷

Judge Nieto-Navia also considered that the majority had been particularly influenced by Galić's failure to act or to prevent and punish crimes, which was not a proper consideration in relation

⁸⁵ *Galić Trial Judgement*, paragraphs 733-745.

⁸⁶ Nieto-Navia Partial Dissent, paragraph 116.

⁸⁷ Nieto-Navia Partial Dissent, paragraph 118.

to a charge of ordering which by its very definition required a positive act.⁸⁸ Judge Nieto-Navia thought, however, that there was sufficient evidence for Galić to be convicted on the basis of Article 7(3).⁸⁹

A key finding in the majority's inference of Galić's orders appears to be his stated agreement with the broader political project behind the conflict in Bosnia. This is discussed in more detail in the section below together with the role of the political in the cases of *Blaškić* and *Gotovina*.

Evidence of 'agreement' or 'collusion' with the overarching political plan as a factor in a commander's responsibility (individual or command) including participation in a Joint Criminal Enterprise

In setting out the practical difficulties inherent in bringing charges for conduct of hostilities crimes, Carolin Wuerzner includes the problem of access to direct evidence of culpability given the likely confidential and closely guarded information of military planning and decision making required to do so. Those whose testimony would be most relevant would also be those least likely to agree to testify for fear of self-incrimination or would be least likely to testify to the truth if there was criminal behavior. She also describes that beyond this there is the important problem that there is a subjective element to the assessment of military targets that makes it hard to establish an individual culpability based on intention. There is, for example, no simple right or wrong answer in making many proportionality calculations.⁹⁰

A particularly interesting theme that arose out of the materials of this research (as opposed to having been a pre-set/expected subject) has been the importance to the judges of the links of the military men to the broader 'political' projects. This seems very far away from discussions of military tactics and strategy regarding targeting decision making that may provide direct evidence of intent. This has, however, provided evidence in the gaps identified by Wuerzner and is also in line with Fenrick's observation, mentioned in the introduction to this chapter,

⁸⁸ Nieto-Navia Partial Dissent, paragraph 119.

⁸⁹ Nieto-Navia Partial Dissent, paragraph 120.

⁹⁰ Carolin Wuerzner, 'Mission Impossible? Bringing Charges for the Crime of Attacking Civilians Or Civilian Objects before International Criminal Tribunals', *International Review of the Red Cross* 90, no. 872 (December 2008): 927-930.

that circumstantial evidence would in general be necessary to prove the responsibility of those in positions of command due to a lack of direct evidence of their actions.⁹¹

Circumstantial evidence, although indirect evidence, is not necessarily weak evidence. In the setting of criminal law in England and Wales it has been said that ‘circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics’, although with the caveat that it ‘is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference’.⁹²

Agreement with the broader (criminal) agenda of their political superiors seems to have been key in proving the intent required for criminal responsibility for acts physically committed by their subordinates. It is also perhaps why the Prosecutor thought it suitable to bring charges against Gotovina based on his alleged participation in a joint criminal enterprise, this alleged joint criminal enterprise being a politically led plan requiring military action to implement it. The use of this evidence at the ICTY starts to show what is necessary for an inference an intention to target civilians, based on circumstantial evidence, to the standard of beyond reasonable doubt.

Alignment with broader criminal political ‘plan’ or ‘ambitions’

Eric Gordy pointed out that from the outset there was a ‘mixing of political and command responsibility’ in the *Blaškić* case.⁹³ The crimes which formed the base of the charges against Blaškić were directly linked to the policy of the Bosnian Croat political leadership to take control of certain areas of Central Bosnia through the removal of the Bosnian Muslims who lived there. This bigger picture also brought in questions of Croatian state involvement in the conflict. The fight for control of evidence held by states and therefore the scope of the prosecution and defence cases went on into the appeal stages of the case and its retention

⁹¹ William J. Fenrick, ‘Gold or Double Standard’, Unpublished Article: 11.

⁹² Mark Lucraft, ed., *Archbold Criminal Pleading Evidence and Practice 2019* (Online: Sweet & Maxwell Ltd, 2019), paragraph 10-3.

⁹³ Eric Gordy, ‘The Blaškić Trial: Politics, the Control of Information and Command Responsibility’, *Southeastern Europe* 36, no. 1 (2012): 65.

and release was incontrovertibly linked to the political situation in Bosnia-Herzegovina and Croatia.⁹⁴

Having spent some time describing the political situation that led to the outbreak of violence in central Bosnia, the *Blaškić* Trial Judges ‘observed’ that:

the HVO military offensives were merely the ultimate outcome of an overall policy of persecution of the Muslim populations pursued by the Croatian military and political authorities. In agreeing to be the Kiseljak region military commander in April 1992 and then Central Bosnia Operative Zone commander in June of that same year, the accused fully subscribed to this policy from the very moment of his posting.⁹⁵

The Trial Chamber note that Blaškić’s orders themselves include reflections of the broader picture of ethnic cleansing taking place in Central Bosnia:

469. The Trial Chamber observes that the reasons adduced in order to justify the order of 16 April (D269) are based on propaganda designed to incite racial hatred. Order D267, for instance, alleges that extremist Muslim forces intended to carry out “ethnic cleansing” on the Croats in the region. Order D269 refers to the intention of the Muslim forces to destroy everything Croatian. Several international observers have stated that those words gave a very exaggerated picture as compared with the real situation.⁹⁶

Orders from Blaškić in relation to the municipality of Kiseljak are even more explicit, with the judges concluding that the orders had the connotation of requiring ‘eradication’ of those in the way of the HVO’s plans, particularly in his use of the word ‘mop-up’.⁹⁷ The meaning of this

⁹⁴ Gordy, ‘The Blaškić Trial: Politics, the Control of Information and Command Responsibility’, 77-79.

⁹⁵ *Blaškić* Trial Judgement, paragraph 660.

⁹⁶ *Blaškić* Trial Judgement, paragraph 469.

⁹⁷ *Blaškić* Trial Judgement, paragraphs 644-646:

644. The Trial Chamber observes that in these orders General Blaškić used terms which were not strictly military and had emotional connotations which were such as to incite hatred and vengeance against the Muslim populations. The opening paragraph of the combat order began with the following assertion:

[the] enemy continues to massacre Croats in Zenica where Muslim forces are using tanks to fire at people, mostly women and children.

Using the same terms, the fourth paragraph added:

Persist tomorrow with the attack or we will be wiped out because the MOS /Muslim armed forces/ and the Mujahedin are advancing against the Croats in Zenica supported by tanks.

The ninth paragraph included an emphatic call to the responsibility of the commander who received the order to “maintain a sense of historic responsibility”.

645. The same terms were again to be found in the combat preparation order of 17 April 1993, in particular in the opening paragraph:

[t]he enemy is continuing the intense attacks against the forces of HVO and is trying to completely eradicate the Croats from the region and destroy all the institutions of

term 'mop-up' was raised on appeal and was not taken by the witnesses brought before the Appeals Chamber to have the same meaning as that found by the Trial Chamber. Witness Philip Watkins, a former British army officer and a member of the European Community Monitoring Mission at the time of the events in question, who was one of the witnesses brought before the judges in relation to the *Blaškić* appeal, was asked what 'mop-up' as a military term in fact meant. Watkins' testimony was that it was a standard military term that could be seen as 'insensitive' but not suggestive of intentional harm to civilians:

A. It's after intense activity, one can go from -- there's levels of intensity of activity, and so after maybe an attack, there would be pockets that one could in a military have left because they were particularly difficult, so one bypasses. And then having won the main objective, you would go back and sort out, either surrender or destroy the enemy, and that action after the main event, when the intensity is reduced to a low intensity activity, that mopping up is the complete control that you wish to have over your territory and the clearing of enemy forces.

Q. Is it a standard military term?

A. Absolutely, yeah.

Q. Is there any connotation in the use of that term that would suggest harm to civilians or ethnic cleansing or something of the like?

A. No, although seeing it on the screen and hearing it, as you say, of course it's what I would call in England an insensitive, politically incorrect thing, but it is standard military terminology. Anyone in the military would understand this.⁹⁸

This was cited in the *Blaškić* Appeal Judgement together with references to similar testimony from witnesses BA1 and BA3.⁹⁹ The Appeal Judges preferred this testimony to the Trial

HVO in the valley of the Lašva. The probable goal of the aggressor, after the accord with the chetniks about the surrender of Srebrenica and other regions, is the military defeat of HVO and the inclusion of our regions into some kind of a greater Serbia or New Yugoslavia. In the combats that raged yesterday, the enemy used the favourite method of the chetniks: pushing women and children in front, to use them as a shield and then to occupy the main strategic objects.

The order's ninth paragraph also emphatically conferred an historic role upon the Kiseljak HVO commander and his troops:

[k]eep in mind that the lives of the Croats in the region of Lašva depend upon your mission. This region could become a tomb for all of us if you show a lack of resolution.

646. Based only on the text, the Trial Chamber notes that the accused used particularly clear terms in entrusting the commander of the Ban Jelačić Brigade with an attack mission. He gave the order to "engage in the blockade of Višnjica and other villages" and to "take control of" or "capture" Gomionica and Svinjarevo. Despite the contention of the Defence, the terms used do not suggest that General Blaškić ordered the commander to capture only the ABiH positions allegedly located in the towns. On the contrary, the eighth paragraph implied that his task went well beyond that. The accused employed radical words in the order which have connotations of "eradication": "All assault operations must be successful and to that end, use units of the Military Police and civilian police for the mopup".

⁹⁸ *Blaškić* Trial Transcript, 9 December 2003, page 298.

⁹⁹ *Blaškić* Appeal Judgement, paragraphs 558-561.

Chamber's findings and found that the language of the relevant order (D300) did 'not necessarily connote eradication or forcible transfer' and went on to consider that 'additional evidence admitted on appeal also indicates that merely military considerations underlay the issuance of these orders'.¹⁰⁰

On appeal, the judges did not deny the crimes that the trial judges had found to have taken place but they did find that Blaškić's criminal responsibility had been overstated given the role of 'political commanders higher than him'.¹⁰¹ Gordy was present in pointing out that lessons of the *Blaškić* Appeal Judgement might be relevant to the Gotovina appeal. He thought that

Quite likely one of the issues on the appeal of this verdict will be whether the two generals who were convicted were named as carrying responsibility that belonged to other people – in this case people who cannot be charged because they are no longer alive [namely the senior Croatian political leadership at the time: Croatian president Franjo Tuđman (who died in 1999), defence minister Gojko Šušak (who died in 1998) and military commander Zvonimir Červenko (who died in 2001)].

And quoted one of the lawyers who had defended Blaškić, Anto Nobile, as saying:

Although I may not know in enough detail how the defence represented Gotovina and Markač and why their defence did not succeed, I have the general impression that they did not do enough to distinguish the soldiers Gotovina and Markač from politics and from Franjo Tuđman, but rather that they tried too much to defend Franjo Tuđman, the leadership of HDZ, Gojko Šušak, and their political engagement. So that could be a reason that the defence failed.¹⁰²

The point remains, however, that the military were used to carry out the bidding of their political masters. The trial judges in both *Blaškić* and *Gotovina* were clearly influenced by evidence that demonstrated an agreement on the part of the soldiers with any criminal political plan and it makes sense that they would be. A soldier cannot just say that they are following orders and stand aloof from the actions they are carrying out for their political masters.¹⁰³ There were, however, in the cases of *Blaškić* and *Gotovina* ultimately found to be

¹⁰⁰ *Blaškić* Appeal Judgement, paragraphs 561-562.

¹⁰¹ Gordy, 'The Blaškić Trial: Politics, the Control of Information and Command Responsibility', 82.

¹⁰² Gordy, 'The Blaškić Trial: Politics, the Control of Information and Command Responsibility', 83.

¹⁰³ The ICTY Statute recognised this principle of customary international law in Article 7(4) which states 'The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.'

legitimate military purposes that these commanders were pursuing that could stand outside the broader criminal machinations of the politics of the war.

In the case of *Galić*, the Prosecution had always accepted that there were legitimate and illegitimate military campaigns proceeding in and around Sarajevo. Finding *Galić*'s responsibility for ordering an unlawful military campaign seems again to have been supported by his political viewpoint and in this case his conviction was upheld on appeal. A stand out moment in the *Galić* trial was part of the testimony of Patrick Henneberry, Senior UNMO and later UNPROFOR commander of the North LIMA side of Sarajevo from July 1992 to February 1993:

Q. Last Thursday, you also told us these words: "The ultimate goal as explained by Indjic and indeed General *Galić* was to either destroy the city or rid it of Muslims." What was the occasion on which General *Galić* said that?

A. That would have been the 16th December meeting. That meeting in fact is the first one I have clearly listed in my notes, although there are references to other meetings I had with him, and I recall that being a very significant meeting.

Q. Were you surprised -- what was your reaction when he said that to you?

A. As a soldier, I realised, having been there for several months, that it was beyond the realm of the feasible for the Serbian forces to be able to destroy the city. To damage it significantly, of course, but to actually destroy the city, that was not feasible for them, given their equipment and ammunition. As far as the comment about ridding the city of Muslims, that was the first time I had personally heard a very senior officer state that, and while I can't claim to be shocked, as I heard that before, it was dismaying that that statement would be made in advance of other negotiations and with the vehemence or certainty that it was given, as I recall.¹⁰⁴

Even from simply reading the transcript, it is possible to sense that the judges hearing the *Galić* case were palpably leaning forwards and doubling their attention to Henneberry when he mentions his direct experience of *Galić*'s view of the situation in Sarajevo. This evidence, including in particular a mention that *Galić* had stated that he wanted to 'either destroy the city or rid it of Muslims', translates into a substantial mention, including a long direct quote from his testimony, in the section entitled 'IV. CRIMINAL RESPONSIBILITY OF GENERAL GALIĆ./C. DID GENERAL GALIĆ KNOW OF THE CRIMES PROVED AT TRIAL?/3. General *Galić*'s Responses to Protests'.¹⁰⁵ It is mentioned again in the section 'E. Did General *Galić* and his Subordinates Act in Furtherance of a Plan?' alongside references to the testimony of Carswell and O'Keeffe as to *Galić*'s motivations:

¹⁰⁴ *Galić* Trial Transcript, 21 May 2002, pages 8590-8591.

¹⁰⁵ *Galić* Trial Judgement, paragraph 681.

Carswell said that General Galić justified indiscriminate attacks which would have been in defence of the Serbian homeland and it is their attempt to preserve the culture. When confronted by O’Keeffe upon the absence of military purpose behind military attacks launched on the city by SRK forces, General Galić responded that he was “going to make this area safe for his children’s children”.¹⁰⁶

This section on the existence of a plan also includes some details of how Galić’s actions fit into the plans of the Bosnian Serb leadership. This includes that Galić presided over a meeting where the strategic goal of the leadership agreed at a meeting in Banja Luka on 12 May 1992 that ‘Sarajevo must be either divided or razed to the ground’ was presented and his conclusions that they should ‘implement the decisions from the meeting in Banja Luka [of 12 May 1992], but submit them to the commands of units and municipalities; hold the present positions and defend them without war’ were adopted.¹⁰⁷

Although the judges in fact do not state or reach a conclusion in this section, this evidence of a ‘plan’ emanating from the Bosnian Serb leadership was raised in the discussion on Galić’s individual criminal responsibility where the majority stated that they were ‘convinced that General Galić promoted the goals of his superiors for Sarajevo by implementing and furthering a campaign of sniping and shelling against the civilian population of Sarajevo’.¹⁰⁸

Henneberry’s evidence emerges again in paragraph 745 in the same section, namely, ‘F. CONCLUSION: DOES GENERAL GALIĆ INCUR CRIMINAL RESPONSIBILITY UNDER ARTICLE 7(1) OF THE STATUTE?/2. Did General Galić Order the Commission of Crimes Proved at Trial?’:

‘....The Majority recalls the evidence of Henneberry, O’Keeffe, Mole and Bergeron. All four witnesses protested to General Galić against the indiscriminate targeting of civilians. Bergeron testified that General Galić was put on notice that “snipers would kill civilians, be it women, children, elderly people, for apparently no other reason than to terrorise the population”. General Galić’s response to Henneberry and O’Keeffe that the ultimate goal was to either destroy the city or rid it of Muslims and that “he was going to make this area safe for his children’s children” speaks for itself. The only reasonable conclusion is that General Galić acted in furtherance of a strategy to attack the civilian population of Sarajevo to spread terror within that population. That conclusion is supported by the evidence of Henneberry that a plan in relation to Sarajevo was communicated to General Galić’s subordinate units....’

Henneberry’s immediate superior in Sarajevo, Senior UNMO James Cutler, caused some discomfort in the courtroom by mentioning that he had met Henneberry in the hotel they

¹⁰⁶ *Galić Trial Judgement*, paragraph 727.

¹⁰⁷ *Galić Trial Judgement*, paragraph 726.

¹⁰⁸ *Galić Trial Judgement*, paragraph 746.

were staying in, while he was waiting to give his testimony and Henneberry was still giving his, and had mentioned to Henneberry about how he remembered Henneberry having been upset by something in their time in and around Sarajevo. This conversation had the potential to taint both of their evidence in the eyes of the judges.¹⁰⁹ What it in fact seems to have done is backed up Henneberry's evidence in the mind of the judges; his experience as recounted to them had someone else who unintentionally backed up the effect it had on Henneberry although it is far from clear that they were discussing the same event.¹¹⁰ This reliance by the majority is also despite the fact that Judge Nieto-Navia clearly had doubts about Henneberry's evidence on this point.¹¹¹

The other key strand of evidence against Galić was the correlation between the use of indiscriminate force against Sarajevo by the SRK and various military or political manoeuvres either regarding Sarajevo itself or the broader conflict in Bosnia. Under the heading 'Control over shelling activity', the judges detail this evidence.¹¹²

The judges cite Witness Y's testimony that he observed 'a definite pattern of shelling', with 'shelling peaks' corresponding to three factors:

- military action or reaction on the ground, for example, in order to repel the Bosnian troops attacking around the area of the Jewish cemetery (trying to cut off a Bosnian Serb supply route) the Serbs shelled the attacking Bosnian troops but also the city itself;
- visits by authorities to Sarajevo, for example, when Mrs Ogata of the UNHCR visited the shelling from both sides intensified as she landed and eased after she took off; and
- negotiations taking place outside Sarajevo, for example in New York or Geneva.¹¹³

The judges decided on the basis of this sort of evidence that Galić was limited on resources and under intense outside scrutiny, but still willing, through the use of those under his command, to use and kill/harm the civilian population to further the military and political goals of his superiors.

¹⁰⁹ *Galić Trial Transcript*, 27 May 2002, pages 9027-9032.

¹¹⁰ *Galić Trial Judgement* at paragraph 689 has Cutler mentioning the effect of the Serb liaison officer's statement to Henneberry rather than that of Galić.

¹¹¹ Nieto-Navia Partial Dissent, paragraph 117.

¹¹² *Galić Trial Judgement*, paragraphs 642-643, 646-652.

¹¹³ *Galić Trial Judgement*, paragraph 642.

Wuerzner considers that the *Galić* judges made ruling on the deliberate nature of an attack seem simpler than it was, for example, in ruling out that the shell that hit Markale Market was a mistake.¹¹⁴ It appears to be the cumulative evidence of the intentions behind *Galić*'s campaign as a whole that filled these evidential gaps.

Joint Criminal Enterprise

In the very first full judgement handed down by the ICTY the judges discussed the possibility of criminal liability pursuant to Article 7(1) being incurred through participation in a common enterprise.¹¹⁵ This was the idea, broadly speaking, that those who did not physically carry out a crime could not escape responsibility if they had in fact intentionally contributed to its commission through membership of a common enterprise, although not in the traditional sense of aiding and abetting the crime. In the *Tadić* Appeal Judgement the judges explored the concept of common purpose, what became known as joint criminal enterprise, in more detail.¹¹⁶ Before going on to expand on their identification of the three modes by which criminal liability could be incurred through this doctrine, the *Tadić* Appeal Judges set out that:

The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).¹¹⁷

In considering the object and purpose of the ICTY Statute as well as the nature of the crimes that were likely to come before the ICTY, the *Tadić* Appeal Judges found that the ICTY Statute

...does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.¹¹⁸

¹¹⁴ Carolin Wuerzner, 'Mission Impossible? Bringing Charges for the Crime of Attacking Civilians Or Civilian Objects before International Criminal Tribunals', *International Review of the Red Cross* 90, no. 872 (December 2008): 927.

¹¹⁵ *Tadić* Trial Judgement, paragraphs 673-692.

¹¹⁶ *Tadić* Appeal Judgement, paragraphs 185-232.

¹¹⁷ *Tadić* Appeal Judgement, paragraph 186.

¹¹⁸ *Tadić* Appeal Judgement, paragraphs 190-191.

By the time of the *Gotovina* Trial Judgement the requirements for a finding of individual criminal responsibility by way of participation in a JCE had been considered in significantly more detail and across broader circumstances. For such liability to be incurred in the case of *Gotovina*, the judges summarised the required elements as i) plurality of persons, ii) a common objective which amounts to or involves the commission of a crime provided for in the Statute and iii) participation of the accused in the objective's implementation.¹¹⁹

Van der Wilt points out that without identifying every single member of a JCE and their individual contributions, intentions and interactions it is impossible fully to set out the precise nature of the JCE.¹²⁰ In the context of a discussion of the ICTY's use of JCE, van der Wilt also states:

Obviously, legal qualifications are by definition rather coarse and abstract. They offer a stylized representation of an unruly reality.¹²¹

The *Gotovina* Trial Judges did, however, appear to understand the complexity of the situation behind the JCE they found to exist and spent a considerable amount of the judgement setting out the participants, the interwoven relationships and scope of this JCE.¹²²

The Trial Chamber concluded that a JCE existed 'with the objective of the permanent removal of the Serb civilian population from the Krajina by force or threat of force, which amounted to and involved persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation, and forcible transfer'.¹²³ The Trial Chamber found that *Gotovina's* conduct amounted to a significant contribution to the JCE given:

- *Gotovina's* participation in the Brioni meeting in relation to planning and preparing Operation Storm;

¹¹⁹ *Gotovina* Appeal Judgement, paragraph 1953.

¹²⁰ van der Wilt, 'Srebrenica: On Joint Criminal Enterprise, Aiding and Abetting and Command Responsibility', 233.

¹²¹ van der Wilt, 'Srebrenica: On Joint Criminal Enterprise, Aiding and Abetting and Command Responsibility', 233.

¹²² *Gotovina* Trial Judgement, paragraphs 1966-2321.

¹²³ *Gotovina* Trial Judgement, paragraph 2369.

- its findings in Chapter 5.8.2 (i) that the HV's shelling of Benkovac, Knin, and Obrovac on 4 and 5 August 1995 constituted unlawful attacks on civilians and civilian objects and that Gotovina ordered the attacks on Benkovac, Knin, and Obrovac; and
- Gotovina's failures to make a serious effort to prevent and follow-up on crimes reported.¹²⁴

He was also found to have 'had the state of mind that the crimes forming part of the objective should be carried out' and intended that his actions contribute to the JCE.¹²⁵ In addition, he was found to be responsible for the crimes of destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions (on their own or as underlying acts of persecution) as a natural and foreseeable consequence of the JCE's implementation.¹²⁶

The witnesses called to testify and cited by the judges in relation to Gotovina's responsibility show how it was the politics of the situation that would ultimately determine his liability in the eyes of the Trial Chamber. The judges had a potentially ambiguous order, but one clearly issued by Gotovina. They used the political context to place this and Gotovina's liability. The majority of witnesses referred to in the responsibility sections of the Trial Judgement are politicians, the evidence related to the political situation and motivations of the Croatian Government. Other than Rajčić, Gotovina's subordinate, the chief of artillery of his forces, the key witness seems to have been Granić, deputy prime minister in the Croatian Government at the time. In contrast, the witnesses to both Blaškić and Galić's responsibility were mainly military men, either international or members of the Bosnian Serb army.

Despite the political nature of much of the evidence called in the *Gotovina* case due to the fact that he was charged as part of a JCE, there was very little definitive evidence of Gotovina's own political views. In amongst the discussion of the JCE there is actually very little mention of Gotovina at all. His participation is mentioned only 25 times (each count being for a paragraph or less) in 351 paragraphs covering 'The Brioni meeting on 31 July 1995 and the preparation for Operation Storm', 'The policy of the Croatian political leadership with regard to the Serb minority and return of refugees and internally displaced persons', 'Property laws', 'Croatian

¹²⁴ *Gotovina* Trial Judgement, paragraph 2370.

¹²⁵ *Gotovina* Trial Judgement, paragraph 2371.

¹²⁶ *Gotovina* Trial Judgement, paragraph 2374.

investigatory policy' and 'The follow-up in relation to the incidents in Grubori and Ramljane on 25 and 26 August 1995'.

Markač is mentioned 14 times in the 233 paragraphs of the sections 'The Brioni meeting on 31 July 1995 and the preparation for Operation Storm', 'The policy of the Croatian political leadership with regard to the Serb minority and return of refugees and internally displaced persons', 'Property laws', 'Croatian investigatory policy'. This does not reveal much about him or his views and seems to relate mainly to his part in planning to provoke the Serbs in order to make their operation appear defensive rather than aggressive. He is mentioned more often in the section 'The follow-up in relation to the incidents in Grubori and Ramljane on 25 and 26 August 1995' where he was more significantly involved.

Both Gotovina and Markač's convictions on the basis of their participation in a JCE were overturned on appeal. The Appeals Chamber found that without the presence of 'unlawful attacks' the very existence of the JCE itself fell apart.¹²⁷ In making this finding the Appeals Chamber referred to the possibility of other interpretations of the circumstantial evidence before them, although without specifying what these might have been:

In this context, no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a JCE with the common purpose of permanently removing the Serb civilian population from the Krajina by force or threat of force.¹²⁸

This decision that the JCE had not in fact existed (as well as the reasoning behind this that the JCE had been based on the existence of unlawful attacks) was strongly criticised by one of the dissenting judges. He questioned the Appeals Chamber's assessment of the Trial Chamber's findings and also why it was necessary to override the Trial Chamber's finding of the existence of the JCE (in his view on doubtful reasoning) rather than considering the contribution of Gotovina to the JCE.¹²⁹

The Trial Chamber's consideration of the broader factors over 200 pages was overturned in a few paragraphs. The dissenting judges, Judge Agius and Judge Pocar, fiercely highlight this lack

¹²⁷ *Gotovina* Appeal Judgement, paragraphs 24, 96-97.

¹²⁸ *Gotovina* Appeal Judgement, paragraph 96.

¹²⁹ See Dissenting Opinion of Judge Fausto Pocar at paragraphs 29-30.

of regard for the factual findings of the trial chamber.¹³⁰ Through these dissenting opinions it can be seen that certain judges would have confirmed or modified rather than overturned the Trial Chamber's findings of culpability. This demonstrates again in turn the difficulty of attempting to use a JCE, direct individual responsibility based conviction, where perhaps a charge of superior responsibility might have been of more use in assessing the actions of the accused and the troops under his command, taking in the masses of evidence of criminal activity that was presented at trial, and even perhaps any outlying elements of legality in the attacks themselves.

Conclusion

This chapter looked at how the judges approached questions of criminal responsibility of commanders for war crimes committed by their subordinates and considered what had influenced their findings. Perhaps surprisingly given the command roles of the accused there was very little role for superior or command responsibility in the sense of Article 7(3) of the ICTY Statute in the judges' findings in this area.

Due to existing case law and a perception on the part of the judges that finding criminal responsibility pursuant to Article 7(1) was the most desirable outcome, the judges found that the commanders' criminal responsibility was best represented in terms of Article 7(1) responsibility for ordering unlawful attacks. This is despite the real difficulty in proving that any order had been given to launch an unlawful attack given the scarcity of direct evidence of unlawful orders being given. This, and the preference for Article 7(1) convictions, translated into a need to rely on circumstantial evidence and therefore a broad consideration of the role and actions of the accused, including their political position.

This precedence given to a finding of Article 7(1) individual responsibility is interesting – and possibly problematic, in all three cases. There was clearly a sense that a finding of individual responsibility implied that the accused had behaved more reprehensibly than a finding of command responsibility would have implied. This desire on the part of the trial chambers to find that the individuals had ordered or otherwise directly engaged in committing crimes with

¹³⁰ See, for example, Dissenting Opinions of Judge Agius at paragraph 45 and Judge Fausto Pocar at paragraph 14.

far from straightforward evidence to this effect left their decisions susceptible to success on appeal.

These cases show the difficulty in incomplete evidence of what the commander actually commanded the troops to do. It cannot be expected that there would be a complete record of the activities of military forces in war time – particularly given the role of spoken commands and secrecy during war. Even if there is not all the evidence the judges would like, however, a decision (as to guilt or not) must be made. The question is whether evidential problems such as missing orders and incomplete log books mean that there is insufficient evidence to prove guilt beyond a reasonable doubt.

Lack of sufficient evidence must mean that the accused is acquitted. On the other hand, lack of direct evidence is not in itself unusual in criminal cases, and in these cases a role was found for circumstantial (or indirect) evidence of individual liability and, in particular, evidence of the motivations of these particular military commanders.

In showing how the judges assessed the orders presented in evidence, it can be seen that the judges did not take such orders at face value and, further, that the judges were prepared to infer that certain orders must have been given. In interpreting the orders or inferring the existing of orders, the judges looked to a range of factors which included the testimony of current and former soldiers. In taking into account these experienced military views on the actions of the accused, it is argued that the ICTY judges did not lose sight of the military viewpoint and they (even if not all commentators) considered that their judgments were always supported by a body of military opinion – even if in places there were strongly opposing views.

The judges, following the lead of the prosecutors, saw significant importance in whether the commanders agreed with the broader ‘political’ aims of their own political masters/commanders because, in the absence of direct evidence of the commanders’ intentions, it provided them with evidence, albeit circumstantial, of the intention required to have ordered an unlawful attack. At trial level, Blaškić’s role was seen as instrumental in the pattern of ethnic cleansing in Central Bosnia, evidence that Galić was attacking Muslim civilians as such was given prominence and a huge amount was written about the high level political machinations of the Croatian government and Gotovina’s part in it. There was, however, a

variation in the role of this evidence between the cases. In the case of *Galić* there was a substantial amount of evidence regarding what his troops had been doing over a long period of time, the political motivations arguments were a supporting factor to this. In the case of Gotovina there was much less evidence of what it was his troops had been shelling, it was mainly his role in the bigger picture that was of interest to the OTP and trial judges.

By the very nature of the ICTY, these commanders were to a large extent put on trial for their role in the broader criminality of the political projects driving the war. The use of evidence showing agreement to a political/criminal scheme as evidence of intention shows that judges did not simply judge commanders on evidence relating to the practicalities of the conduct of commanding operations. Ultimately, however, the commanders were acquitted if it was found that they were pursuing legitimate military objectives. This can again be seen to demonstrate that the ICTY judges did not lose sight of the military viewpoint of the actions they were being asked to judge.

The next chapter is the conclusion to this project which draws together the conclusions from the separate threads of law, evidence and responsibility in the demarcation of the law of targeting that have been considered here and in the previous chapters. It concludes with some thoughts on the research study as a whole.

Introduction

This research began with the purpose of investigating in detail the work of the ICTY; specifically, to examine the application of the laws of war as they related to questions of targeting and to consider how the law was defined and applied. The work of the ICTY was significant in this regard because it was one of the rare occasions on which these questions of international law had come before international judges. In this demarcation of the law, what, ultimately, guided the judges' findings as to the criminal responsibility or exoneration of commanders for actions taking place on the battlefield?

It was apparent at the outset of this study that the work of the judges in this field could not be seen in splendid theoretical legal isolation. The relationship between the judges and the evidence before them, usually derived from witness testimony, had to be considered. Asking what they decided and based on exactly what evidence led to questions of what factors drove their decision making. The consideration of how judges relied on evidence from witnesses with military or civilian backgrounds, expert or not, was raised through reading the judgments and transcripts of the hearings. In the context of the incomplete documentary record, likely in any conflict situation, the witnesses and the judges' approach to these witnesses really were key to their findings of guilt or innocence.

At an even more fundamental level, in considering what factors the judges were taking into account in reaching their decisions, questions of legal theory arose as to how judges reach decisions in cases where there is no fully formed answer in existing legal knowledge. Previous studies had termed what the judges had done in some such cases 'judicial creativity' and this seemed a fitting term for what the judges had achieved in the area of the law of targeting.¹ The motivations of the judges that were identified by those studying their work included political influences linked to the place of the ICTY in the UN system and broader international

¹ See, for example, the various contributions to Shane Darcy and Joseph Powderly, eds., *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010).

relations, but more often they were termed as something moral or non-legal.² The judges at the ICTY demonstrated the desire to 'do the right thing' and to do their bit to establish the law as something that would provide justice for victims but also create as full as possible legal protection for the innocent in future conflicts. This desire can be seen as a facet of the principle of 'humanity', so fundamental to the development of the law of armed conflict or international humanitarian law.

The overarching research question posed in order to consider this topic was how had the judges in certain cases at the ICTY implemented the law of targeting and, given this, could any factor(s) be identified as having influenced the many decisions on law, evidence and responsibility they had to make in reaching their judgments? As a corollary to this question, it was asked whether the principle of humanity, broadly defined, was a determining influence in judicial decision making as it specifically related to the demarcation of the law of targeting. This study sought to establish, in all the decisions the judges had to make as to the law, evidence and responsibility, whether humanity or any other factors guided these decisions and, in some cases, their creativity.

To consider the 'law of targeting' at the ICTY involved an appreciation of the framework in which the demarcation of the law was taking place. As set out in Chapter 2 (The framework for the demarcation of the law of targeting at the ICTY) this included elements of international humanitarian law or the law of armed conflict, public international law, international criminal law, the law of evidence, procedure and responsibility as well as the case law of the ICTY itself.

The thesis presented here is that humanity was a driving factor in the demarcation of the law of targeting. As set out in Chapter 3 (Law) and Chapters 4 and 5 (Evidence I: The witnesses and Evidence II: Finding criminal intent), this was evident in the direction in which the law was developed in accordance with the provisions of API and the ICRC guidance as well as the role given to the voices of those who lived through the conflict. Humanity, however, was not the only influence or motivation.

In addition to the influence of the principle of humanity, and as was also seen throughout this work, there was a clear role in the decisions made by the judges for military opinion as to

² As, for example, in the case of Alexander Zahar, 'Civilizing Civil War: Writing Morality as Law at the ICTY' in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, eds. Bert Swart, Alexander Zahar and Göran Sluiter (Oxford: Oxford University Press, 2011).

acceptable and unacceptable conduct of military operations. This was particularly evident in the questions raised by the evidence the judges were presented with as discussed in Chapters 4 and 5 (Evidence I: The witnesses and Evidence II: Finding criminal intent) and in relation to the criminal responsibility of the accused (Chapter 6 (Responsibility)). The judges' desire to emphasise the humanitarian side of the law of armed conflict was not, perhaps contrary to expectations, often in opposition to the views of those with military experience. The judges also clearly relied on those military and civilian witnesses, some of whom were victim witnesses, who had experienced the effects of the use of artillery as was seen in Chapters 4 and 5 (Evidence I: The witnesses and Evidence II: Finding criminal intent).

As was seen in Chapter 6 (Responsibility), in considering the individual criminal responsibility of the commanders in *Blaškić*, *Galić* and *Gotovina*, the judges looked, in particular, to the contents and meaning of their orders as well as the potential for implied orders. The views of the military witnesses together with each commander's role in the broader picture of the conflict both influenced the judges' determinations here.

The remainder of this chapter considers the research findings in more detail. It does this under the headings 'A change of focus: Civilians and the protection of their 'humanity' in the ascendant', 'Key role of the military viewpoint and importance of civilian witnesses with lived experience of the use of artillery' and 'The criminal responsibility of military commanders' which broadly map on to the research discussed in the chapters law, evidence and responsibility respectively although there is some overlap between the topics.

A change of focus: Civilians and the protection of their 'humanity' in the ascendant

In establishing how the judges had implemented the law of targeting this study first considered to what extent humanity, or any other concept or factors, influenced this implementation. The study has shown that in adopting the relevant provisions of the 1977 Additional Protocols (and the ICRC's guidance on them) and in finding that customary international law mirrors these provisions, the judges have without doubt confirmed the place of the ICRC's humanitarian driven achievements in the development of the protection of civilians caught up in the conduct of hostilities. In doing this they have displaced older legal regimes which did not place such an emphasis on 'humanity'.

In reflecting on the development of the laws of war by the ICTY judges, the law applicable to the siege of Sarajevo provides a useful microcosm to demonstrate what this development in fact means in practice for the protection of civilians and the application of the principle of humanity. It is apparent that, despite impressions of professional armies facing each other on far removed battlefields through the past, civilians have long faced the horrors of war. One example of this is their place in siege warfare.

There have been conventions and laws of siege warfare since ancient times, from the Romans, through medieval wars and the crusades to the American War of Independence, American Civil War and the Second World War.³ The civilians under these sieges, however, had very little, if any, protection afforded by law. When defended cities were besieged or taken by storm in the European medieval period there was an acceptance that anyone in it was liable to the consequences, no matter how little choice they had in being there. Civilians were not protected by any rules as to the conduct of hostilities or laws of war. As Jim Bradbury states, 'What to the modern mind are 'atrocities', were a normal part of medieval war.'⁴ Bruce Collins points out that even by the time of the Napoleonic Wars there was a strongly held view that soldiers 'had the right of conquest' after having taken a town by force and that the 'eighteenth-century desire to differentiate between soldiers and civilians clearly broke down completely in these contexts. Sieges thus affronted Enlightenment efforts to confine war-fighting as far as possible to professional armies.'⁵

During the siege of Leningrad artillery orders were given to fire towards any civilians attempting to leave the starving city. These orders directed that the artillery should open fire 'as early as possible, so that the infantry, if possible, is spared shooting on civilians.' In the High Command judgment the commander, Von Leeb, was found to know and approve of this order. In considering whether this was an unlawful order, the judges concluded that it was not. They acknowledged that starvation of the civilians within a besieged city along with its defending

³ For a detailed view see Jim Bradbury, *The Medieval Siege* (Woodbridge, Suffolk: The Boydell Press, 1992); Christopher Duffy, *Siege Warfare: The Fortress in the Early Modern World 1494-1660* (London: Routledge, 1997) and, in particular, Benjamin Valentino, Paul Huth and Sarah Croco, 'Covenants without the Sword: International Law and the Protection of Civilians in Times of War', *World Politics* 58, no. 3 (2006): 352 for effect of siege warfare on civilians in context.

⁴ Bradbury, *The Medieval Siege*, 320.

⁵ Bruce Collins, *Wellington and the Siege of San Sebastian 1813* (Barnsley: Pen and Sword Military, 2017), 24.

soldiers was a legitimate means of conducting warfare and preventing these defending soldiers from expelling extra people to feed 'so as to hasten the surrender' was not unlawful.⁶

Despite the protection afforded to civilians through the Geneva Conventions of 1949, it was in fact the Additional Protocols of 1977 that recognised a change that meant that this military behaviour of the past was no longer acceptable to a large number of states. The Additional Protocols addressed the position of civilians who found themselves in the firing line of a conflict and it was in the negotiation of the Additional Protocols that the protection of civilians was first properly considered in the context of the conduct of military operations. The provisions included in Additional Protocol I regarding the limitation on the conduct of all targeting operations to prevent or minimise harm to civilians reflected a real change in approach. The ICRC had brought their drive for humanity, even in the midst of conflict, to the heart of the rules on the conduct of hostilities. Where the Additional Protocols apply, there is no possible legal justification for firing *at* civilians.

Although the Additional Protocols were adopted in 1977, when the Secretary General and his team drafted the ICTY Statute in the early 1990s they did not include any of the provisions of API as part of the law to be applied. The Report of the Secretary General did not say why they had not been included; it was left to infer that it was because they did not consider that these were rules that were 'beyond any doubt' existing customary law at the time of the acts the accused were alleged to have committed or because they did not think they could form the basis of workable prosecutions.⁷ At the time that the judges in the cases of *Blaškić* and *Galić* were reaching their judgments, it was not clear that the principle of humanity was in the ascendant in the restraints placed on military operations. The war crimes provisions of the ICTY Statute were not reflective of IHL as we now know it and did not seem to fit the change identified in the Additional Protocols, seemingly firmly in the LOAC school of thought.

The Secretary General of the UN and the UN Security Council had provided the ICTY with a list of crimes that without doubt fell under their jurisdiction and this did not include Article 51(2) of API ('The civilian population as such, as well as individual civilians, shall not be the object of attack....') or any equivalent from customary law. The judges of the ICTY, particularly those in the cases of *Blaškić* and *Galić*, did not have to find that a crime of unlawfully attacking civilians

⁶ Subsequent Nuremberg Trials, Green Series Vol XI, p.563.

⁷ Report of the Secretary-General at paragraphs 34-35.

that mirrored the provisions of Article 51(2) API existed in international law in a form capable of falling under the jurisdiction of the ICTY.

Despite this, the judges in *Blaškić* accepted that there was a crime of unlawfully directing an attack against civilians, 'recognised by Article 51(2) of Additional Protocol I',⁸ within their jurisdiction. The *Galić* judges likewise found that unlawful attacks against civilians were prohibited in the terms set out in Article 51(2). In applying the principle of distinction there was a move from pre to post API rules. In considering the evidence against the charges in relation to the shelling of Kosevo Hospital in Sarajevo, for example, the judges applied the relevant provisions of API and the ICRC commentary alongside military testimony. In considering the concept of proportionality the *Galić* and *Gotovina* Trial Judges again looked to the API definitions. The definitions of civilian and 'military objectives' have been explicitly based on the provisions of API.

The judges (as well as the OTP and defence counsel) at the ICTY have demonstrated that it is possible to use the targeting rules within Additional Protocol I as a basis for a prosecution and conviction. This can be seen to have side-lined the application of the older rules prohibiting wanton destruction which were less directly relevant to the protection of civilians and which permitted an exception for 'military necessity'.

Beyond this, however, their willingness to expand the jurisdiction of the ICTY and the interpretations they have engaged have shown a desire to improve the legal protection of civilians in war, a concept aligned with the principle of humanity. The Trial Judges in *Blaškić*, for example, also showed a tendency to discount or ignore the disorganised defence of villages in the light of ethnic cleansing. This is an area of the law with some room for interpretation and was based on facts specific to this case; what it seemed to show was how the judges wanted to interpret the law in the favour of the victims of the conflict, not those waging it. As discussed in the next section, however, this emphasis on civilians did not expand to a desire to override the military viewpoint.

⁸ *Blaškić* Trial Judgement, Disposition

Key role of the military viewpoint and importance of civilian witnesses with lived experience of the use of artillery

It is in the consideration of the evidence relating to the artillery shots fired that the heart of the law of targeting becomes apparent. Here the judges had to assess whether the shots had been fired with criminal intention or not. With little to no direct evidence of the intention behind each shot or even campaign, this assessment came down to the views of those who had been present, subjected to the shelling as a resident of the area or there as international military observers posted into the war zone.

It was apparent from the treatment of the evidence by the judges that it was the experience and knowledge of military and civilian non-expert witnesses who had physically experienced the effects of the targeting decisions which had the greatest influence on their findings. The legal principle of humanity does not have a role in this evidential arena, but 'humanity' is still much in evidence in the trial transcripts; in the testimony of those who had suffered and witnessed suffering, in the reaction of the judges to these witnesses, in the brief bursts of deeply held opinion that escaped through the controlled examination and cross examination of military witnesses in the court room.

This is the part of the research where expert evidence directing the judges as to the requirements of targeting decision making potentially had the biggest role given the technical nature of the use of artillery; there were in *Galić* and *Blaškić* in particular, plenty of complex calculations that could be presented to demonstrate the source of a shell or bomb. The experience and knowledge of the military and civilian non expert witnesses had, however, at the least, equal prominence in the judgments.

The coding of the trial transcripts carried out for this research considered against the relevant parts of the judgments led to the conclusion that it was military witnesses and, in particular, international ones (in the sense that they were from outside the states of the Former Yugoslavia), that were key to setting the tone of the judges' assessment of the military behaviour in question. The impact of these military witnesses was examined further through closely tracking the use of the word 'random' in the *Galić* and *Gotovina* testimony and judgments in the context of establishing that civilians were being directly targeted.

On the whole, there was significant military opinion in the testimony at trial level that the accused and those under their command had breached the legal bounds of war, had acted unprofessionally and criminally. Tellingly, at appeal, the military viewpoint went in the opposite direction in the cases of *Blaškić* and *Gotovina*. At the trial level evidence was given that the attack on Knin was inexplicably massive and made no sense unless it was being used to force the civilians to leave rather than simply attack military objectives. The judges, in demonstrating their agreement with this position, utilised the 200m system (which did not have a clear source in the testimony before them) in a way, however, that did not in fact stand up to the scrutiny of a body of military opinion. The majority of the Gotovina Appeal Judges considered that they could not support a finding of unlawful attack at all. This was heavily criticised by the minority for not taking into account the totality of the evidence presented to the trial judges, which would have included the original military opinion that the attack did not respect the principle of distinction.

The international military personnel gave a distinct impression of their views of the balance to be found between military professionalism and humanitarian concerns and where lines had been crossed into unlawful behaviour. The judges were slow to circumscribe the testimony of military witnesses not designated as experts even if it tended towards opinion if it was clear that they had relevant knowledge or experience.

The international military personnel who testified before the ICTY in these cases were not machines, they were human beings with military experience and knowledge. Their humanity was often on display through their clear articulation of the effects of the war on the people subject to it. As a whole they gave the impression of being extremely professional and knowledgeable; they tended to be compelling when they talked of matters that they considered to be outside of acceptable or explicable military conduct.

The role of civilian (including victim) evidence from those who had experienced the conflict first hand, in particular as to the source of fire and its intended target was also picked up during the coding exercise. It cannot be claimed from this research that this civilian witness evidence would have stood by itself as sufficient proof for the judges' findings and it is apparent that the judges relied significantly on military technical assessments. Where there was some doubt as to what this technical evidence could prove, however, the corresponding victim and other civilian witness evidence gave the judges support in reaching their

conclusions. What this testimony does seem to have added in the case of *Galić* is a sense of certainty to the judges' findings; these witnesses knew who was firing at them, from where and why. This was an unarguable insight into the fact that civilians were being targeted. This was lacking in the case of Gotovina and Knin and a weakness of that case; possibly inescapably so due to the short duration of the shelling operation.

The Criminal responsibility of military commanders

The third element of the research question asked how the judges implemented the individual criminal responsibility element of the law of targeting and whether any influences could be identified regarding the judges' findings as to criminal responsibility, that is, as to the guilt or innocence of the accused before them. In answer, this research posits that the judges considered a wide range of potential forms of liability and evidence pointing to liability of military commanders; this was based in the totality of the factual realities surrounding the commanders as communicated to the judges through the trial process. This is interesting because the written contents of the law does not concern itself with the broader picture within which the military commanders are operating and occurred because of the lack of direct evidence of innocence or culpability.

There had been no comparable cases to those of the military commanders tried at the ICTY since the trials held after the Second World War. Even then, these provided little clear precedent. There had never been such trials based on the law set out in the Additional Protocols (and on which the responsibility provisions of the ICTY Statute seem to have been based). The law in this area has developed so as to be applied neutrally to both or all sides of any conflict; there is no relevance to whose side a commander is on, who started the conflict or who is on a 'good' side with the better intentions. Responsibility for complying with the laws of war is treated in factual isolation.

What the law envisages is an investigation of the intentions of those making targeting decisions as to the military objective they were aiming for or to achieve and their knowledge as to the facts on the ground as to the likely effects of the weapons they chose to use to achieve it before they launched the attack. Did they know that civilians were likely to be harmed and if so, what was their proportionality calculation? If they were aiming to hit

civilians there is no question that that decision was wrong. Given the reality of gathering evidence as to what exactly was being decided in the midst of and following a conflict this type of evidence was, however, rarely before the judges.

The lack of evidence of what exactly was ordered and happened in consequence led in certain cases to the use of inferences and circumstantial evidence to prove guilt. Although this seems to open a wide range of possibilities the judges seem to have filled some of the evidential gap by considering the broader role and intent of the commanders under consideration.

In addition, the findings of criminal responsibility on the part of commanders were not made on the basis of the judges' views only. In all cases they had testimony from military personnel that supported their findings. They always seemed to consider that they were making a finding in agreement with a body of military opinion before them. This, again, held for the appeal judgments where the trial judges' findings were overturned in the cases of *Blaškić* and *Gotovina*.

At the start of this research it was assumed that 'command' or 'superior' responsibility in the sense of the responsibility of commanders for the acts of their subordinates as per Article 7(3) of the ICTY Statute would form a large part of the study. On the contrary, it has not formed much of the final work at all. The judges at the ICTY in these three cases sought to convict on the basis of individual responsibility of the accused (where guilt was in fact found). This does not mean that the role of 'command' itself was not important. It was, in particular, through the act of their orders to their subordinates that the commanders were accused of committing criminal acts. To be convicted for 'ordering' an act requires that a chain of command exists and that orders will be followed. The standard consolidated through these cases was that the orderer must intend that a crime be committed or that there was a substantial likelihood that a crime would be committed in the execution of their order. The lack of a role for Article 7(3) demonstrated that the judges thought that convicting on the basis of direct, rather than indirect, criminal responsibility was a better reflection of the criminal role of the commanders in question despite the lack of clear-cut evidence of unlawful orders.

The judges showed that they were not willing to take orders on their face value (*Blaškić*) and even at times refused to accept orders demanding compliance with IHL as reflective of overall orders from a commander (*Galić*). They were willing to infer the existence of orders to carry

out unlawful attacks from evidence of a strong, well-functioning chain of command and evidence of unlawful attacks being committed over a long period of time. They also demonstrated that they were not willing to rely only on ambiguous orders with insufficient corroborating evidence of unlawful attacks (*Gotovina*, trial and appeal).

The impact of the political motivations of the commanders was, however, limited. As would be expected, the commanders were acquitted if they were found to have been pursuing military objectives irrespective of their political leanings. The contents of Blaškić's orders found to be incendiary by the Trial Chamber did not change, but he was also ultimately found to be acting towards legitimate military ends.

Although the individual responsibility of Galić and Blaškić was alleged based on the orders that they had given, *Gotovina* was charged on the basis of alleged participation in a Joint Criminal Enterprise. The allegation that he had issued orders to launch unlawful attacks was made in the context of his contribution to the Joint Criminal Enterprise. There was therefore a question of whether he had intended to order unlawful attacks but this was placed within the broader picture of the political machinations of the Croatian government of the time and whether *Gotovina* subscribed to these views. The *Gotovina* Appeal Judges found that there was insufficient evidence to support the finding that *Gotovina* had ordered unlawful attacks and the status of these attacks was found to be so fundamental to his alleged role in the Joint Criminal Enterprise that all other responsibility fell away.

This was the area of research in which coding work in NVivo played a large role in establishing themes. Coding was carried out and themes arose naturally from reading the judgments and transcript texts. Through this process evidence relating to orders was highlighted and categorised. More organically, as not pre-identified in any way, the theme arose of military commanders subscribing to the overarching political projects of their respective political leaders as a contribution to a finding of criminal responsibility. This coding highlighted that the judges were particularly interested in the link between military commanders and the broader criminality of the conflict. This is perhaps not at all surprising given that the judges were considering persecutory intent for crimes against humanity charges, however, it confirms that military commanders were not judged simply on their military conduct and perhaps the intention requirement of the crimes means that they never could be. To show the intent behind a military operation may always require a broader knowledge of the goals of those who

have made the decision to deploy their armed forces and the extent to which the military agree with them. It also shows the sort of evidence that can go towards finding a commander such as Galić guilty of ordering unlawful sniping and shelling attacks in the absence of evidence of physical orders in fact doing so.

Ultimately, the judges were willing to consider that there could be military objectives motivating the actions of the indicted military commanders and the soldiers under their command. The judges confirmed that it was the intention behind the targeting decisions that underpinned any potential criminal responsibility. The lack of direct evidence of this intention was not, however, at the trial level in particular, taken as a reason not to make a finding of guilt. In all cases the broader picture of the conflict and the role of the accused commanders within it were used alongside the effects of whatever decisions had been made to fill this evidential gap.

If the relevance of the broader picture to the prosecution and judges was because of the desire to ensure that the victims of the political projects saw someone who subscribed to these projects answering for what happened, it is here that the implications of the project of broadening the coverage of IHL and its principle of humanity must, in particular, be considered. It is not wrong to look for evidence of the intention of those directing attacks but care must be taken that this evidence does not become too far removed from the actual actions and therefore criminal responsibility of the accused. It is important that the judges at appeal level were able and willing to overturn the trial judges' findings where they considered that this evidence was not, in fact, sufficient to prove guilt beyond a reasonable doubt.

Conclusion

The demarcation of the law of targeting carried out by the judges at the ICTY involved the significant development of the law of targeting in international law. The judges in the cases of *Blaškić*, *Galić* and *Gotovina* were presented with a rare, and therefore important, opportunity to apply the law applicable to the conduct of hostilities to the actions of military commanders and set precedents for future cases. Given that there was, however, room for interpretation in the application of the law of targeting at the ICTY it was also important to examine how the judges implemented the law of targeting and what influenced them in doing so.

To summarise the results of this study, the following paragraphs set out the key findings that answer the central question of this research, namely, how did the judges implement the law of targeting and, given this, could any factor(s) be identified as having influenced the many decisions on law, evidence and responsibility they had to make in reaching their judgments?

Firstly, the ICTY developed the law of targeting in line with the precedence of the principle of humanity and a worldview strongly guided by the International Committee of the Red Cross. In affirming that the provisions of Additional Protocol I relating to targeting can be the basis for a conviction, the judges rendered certain earlier provisions incorporating 'military necessity' (although not the broader principle itself) potentially obsolete in this context.

Secondly, the ICTY judges did not lose sight of the military viewpoint and they considered that their judgments were always supported by a body of military opinion – even if in places there were strongly opposing views among military practitioners. This demonstrated that the judges had no interest in making findings that could not be applied by those who in fact have to make targeting decisions.

Thirdly, the judges attached significant importance to the evidence provided by civilian (including victim) witnesses with lived experience of the effects of artillery. This was even the case where there was also a large amount of technical or expert evidence available.

Finally, ICTY jurisprudence gave precedence to convictions pursuant to Article 7(1) of the ICTY Statute rather than Article 7(3) superior/command responsibility. An absence of direct evidence of targeting decision making by these commanders meant, alongside evidence of the orders they had issued, the judges considered circumstantial evidence including that of the accused's role in the broader conflict.

Bibliography

Primary Research

Correspondence with Professor (formerly Judge) Ćinić (conducted via e-mail, 14 November 2017 – 10 February 2018)

Documents

Documents relating to the establishment of the ICTY

Statute of the International Criminal Tribunal for the Former Yugoslavia adopted on 25 May 1993 as amended up to 7 July 2009. Available at <http://www.icty.org/en/documents/statute-tribunal> (last accessed 24.09.2019).

S/25704, Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808, 3 May 1993. Available at <http://www.icty.org/en/documents/statute-tribunal> (last accessed 24.09.2019).

Security Council Resolution 780 (1992) of 6 October 1992. Available at <http://unscr.com/en/resolutions/780> (last accessed 24.09.2019).

Security Council Resolution 808 (1993) of 22 February 1993. Available at <http://www.icty.org/en/documents/statute-tribunal> (last accessed 24.09.2019).

Security Council Resolution 827 (1993) of 25 May 1993. Available at <http://www.icty.org/en/documents/statute-tribunal> (last accessed 24.09.2019).

ICTY Case Related Documents

(All available from <http://www.icty.org/en/action/cases/4> (last accessed 24.09.2019) and ICTY Court Records Database <http://icr.icty.org/> (last accessed 25.09.2019))

Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Appeals Chamber Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999.

Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber Judgement, 24 March 2000.

Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Chamber Judgement, 3 March 2000.

Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgement, 29 July 2004.

Prosecutor v. Blaškić, Case No. IT-95-14, Transcripts of trial and appeal hearings, 24 June 1997 to 17 December 2003.

Prosecutor v. Galić, Case No. IT-98-29-T, Trial Chamber Judgement, 5 December 2003.

Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgement, 30 November 2006.

Prosecutor v. Galić, Case No. IT-98-29, Transcript of trial hearing, 3 December 2001 to 9 May 2003.

Prosecutor v. Gotovina, Čermak and Markač, Case No. IT-06-90-T, Trial Chamber Judgement, 15 April 2011.

Prosecutor v. Gotovina and Markač, Case No. IT-06-90-A, Appeals Chamber Judgement, 16 November 2012.

Prosecutor v. Gotovina, Čermak and Markač, Case No. IT-06-90, Transcript of trial hearing, 11 March 2008 to 1 September 2010.

Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Trial Chamber Judgement, 26 February 2001.

Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeals Chamber Judgement, 17 December 2004.

Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Chamber Judgement, 14 January 2000.

Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, Appeals Chamber Judgement, 23 October 2001.

Prosecutor v. Martić, Case No. IT-95-11-T, Trial Chamber Judgement, 12 June 2007.

Prosecutor v. Martić, Case No. IT-95-11-A, Appeals Chamber Judgement, 8 October 2008.

Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Chamber Judgement, 31 January 2005.

Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgement, 17 July 2008.

Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Judgement, 7 May 1997

Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgement, 15 July 1999

Other ICTY Documents

ICTY Rules of Procedure and Evidence first adopted on 11 February 1994 and amended up to 10 July 2015. Available at <http://www.icty.org/en/documents/rules-procedure-evidence> (last accessed 24.09.2019).

International Court of Justice

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226.

Internet Material

Amnesty International, 'Middle East and North Africa 2017/2018', <https://www.amnesty.org/en/countries/middle-east-and-north-africa/report-middle-east-and-north-africa/> (last accessed 16.06.2019)

Human Rights Watch, 'Syria: Events of 2017', <https://www.hrw.org/world-report/2018/country-chapters/syria> (last accessed 16.06.2019).

International Committee of the Red Cross, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14 (last accessed 18.09.2019).

International Committee of the Red Cross, Mandate and Mission, <http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm> (last accessed 28.09.2019).

International Committee of the Red Cross, Fundamental Principles, <https://www.icrc.org/en/fundamental-principles> (last accessed on 26.02.2019)

International Criminal Tribunal for the Former Yugoslavia, About the ICTY: Translation and Interpretation, <http://www.icty.org/en/about/registry/translation-and-interpretation> (last accessed 14.06.2018)

Jacobs, Dov. 'Follow up on the reactions to the Harhoff letter' posted on 14 June 2013 at <https://dovjacobs.com/2013/06/14/follow-up-on-the-reactions-to-the-harhoff-letter/> (last accessed 16.06.2019)

Milanovic, Marko. 'The Gotovina Omnishambles' posted on 22 November 2012 at <https://www.ejiltalk.org/the-gotovina-omnishambles/#more-6975> (last accessed 17.06.2019).

Milanovic, Marko. 'Danish Judge Blasts ICTY President' posted on 13 June 2013 at <https://www.ejiltalk.org/danish-judge-blasts-icty-president/> (last accessed 16.06.2019).

Vukusic, Iva. 'Assessing the ICTY's Legacy' blogpost posted on 26 June 2017 at (<http://blogs.kcl.ac.uk/warcrimes/2017/06/26/assessing-the-ictys-legacy/>) (last accessed on 18/01/2018).

Published Sources

Acquaviva, Guido. 'A Conversation with Antonio Cassese'. *Leiden Journal of International Law* 25, no. 3 (2012): 815-827. doi:10.1017/S0922156512000404.

Adams, Catherine. 'International Law and Institutional Legacy'. In *Prosecuting war crimes: lessons and legacies of the International Criminal Tribunal for the former Yugoslavia*, edited by James Gow, Rachel Kerr, and Zoran Pajić, 58-87. Abingdon, Oxon; New York: Routledge, 2014.

Arajärvi, Noora. *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*. London: Routledge, 2014.

- Altheide, David L. and John M. Johnson. 'Reflections on Interpretive Adequacy in Qualitative Research'. In *The SAGE Handbook of Qualitative Research*, 4th ed. edited by Norman K. Denzin and Yvonna S. Lincoln, 581-594. Thousand Oaks, CA; London: SAGE, 2011.
- Anderson, Bruce. 'The Nine Lives of Legal Interpretation'. *Journal of Macrodynamical Analysis* 5 (2010): 30-36.
- Atkinson, Paul and Amanda Coffey. 'Analysing Documentary Realities'. In *Qualitative Research: Theory, Method and Practice*, 3rd ed. edited by David Silverman, 77-92. London: SAGE, 2011.
- Auerbach, Carl F. and Louise B. Silverstein. *Qualitative Data: An Introduction to Coding and Analysis*. New York and London: New York University Press, 2003.
- Baarda, Th A. van. 'Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics'. *Yearbook of International Humanitarian Law* 11 (2008): 3-49. doi:10.1017/S1389135908000032.
- Balkin, Jack M. 'Deconstructive Practice and Legal Theory'. *The Yale Law Journal* 96 (1987): 743-786.
- Bartels, Rogier. 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials'. *Israel Law Review* 46, no. 2 (2013): 271-315. doi:10.1017/S0021223713000083.
- Beer, Yishai. 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity'. *European Journal of International Law* 26, no. 4 (2016): 801-828. doi:10.1093/ejil/chv054.
- Bennoune, Karima. 'As-Salāmu`Alaykum - Humanitarian Law in Islamic Jurisprudence'. *Michigan Journal of International Law* 15, no. 2 (1994): 605-643. <http://repository.law.umich.edu/mjil/vol15/iss2/7>.
- Blank, Laurie R. 'Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law'. Emory Public Law Research Paper No. 12-186. (January 28, 2012) Available at SSRN: <https://ssrn.com/abstract=1994414> or <http://dx.doi.org/10.2139/ssrn.1994414>
- Boas, Gideon, James L. Bischoff, and Natalie L. Reid. *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*. Cambridge: Cambridge University Press, 2008.
- . *International Criminal Law Practitioner Library Volume 2: Elements of Crimes Under International Law*. Cambridge: Cambridge University Press, 2009.
- Boas, Gideon, James L. Bischoff, Natalie L. Reid, and B. Don Taylor III. *International Criminal Law Practitioner Library Volume 3: International Criminal Procedure*. Cambridge: Cambridge University Press, 2011.

- Boister, Neil, and Robert Cryer. *The Tokyo International Military Tribunal - A Reappraisal*. Oxford: Oxford University Press, 2008. doi: 10.1093/acprof:oso/9780199278527.001.0001.
- Boothby, William H. *The Law of Targeting*. Oxford: Oxford University Press, 2012.
- Bouwknegt, Thijs B. and Adina-Loredana Nistor. 'Studying 'Perpetrators' through the Lens of the Criminal Trial'. In *Perpetrators of International Crimes: Theories, Methods, and Evidence*, edited by Alette Smeulers, Maartje Weerdesteijn and Barbora Holá, 89-113. Oxford: Oxford University Press, 2019. doi: 10.1093/oso/9780198829997.003.0006.
- Bradbury, Jim. *The Medieval Siege*. Woodbridge, Suffolk: The Boydell Press, 1992.
- Central Intelligence Agency. *Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990– 1995*, 2 Volumes. Washington: CIA, 2002.
- Coffey, Amanda. 'Analysing Documents'. In *The SAGE Handbook of Qualitative Data Analysis*, edited by Uwe Flick, 367-379. London: SAGE Publications, 2013.
- Coleman, J. L. and Leiter, B. 'Legal Positivism'. In *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. edited by D. Patterson, 228-248. Chichester, West Sussex; Malden, MA: Wiley-Blackwell, 2010. doi:10.1002/9781444320114.ch14.
- Collins, Bruce. *Wellington and the Siege of San Sebastian 1813*. Barnsley: Pen and Sword Military, 2017. Ebook version.
- Coupland, Robin. 'Humanity: What is it and how does it Influence International Law?'. *Revue Internationale De La Croix-Rouge/International Review of the Red Cross* 83, no. 844 (2001): 969-989. doi:10.1017/S156077550018349X.
- Cover, Robert M. 'Violence and the Word'. *The Yale Law Journal* 95 (1986): 1601-1629.
- Cryer, Robert. 'Witness Evidence before the International Criminal Tribunals'. *Law and Practice of International Courts and Tribunals* 2, no. 3: 411-439.
- . 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake'. In *Judicial Creativity at the International Criminal Tribunals*, edited by Shane Darcy and Joseph Powderly, 159-183. Oxford: Oxford University Press, 2010. doi:10.1093/acprof:oso/9780199591466.003.0008.
- Darcy, Shane and Joseph Powderly, ed. *Judicial Creativity at the International Criminal Tribunals*. Oxford: Oxford University Press, 2010. doi:10.1093/acprof:oso/9780199591466.001.0001.
- Darcy, Shane. 'The Reinvention of War Crimes by the International Criminal Tribunals'. In *Judicial Creativity at the International Criminal Tribunals*, edited by Shane Darcy and Joseph Powderly, 106-128. Oxford: Oxford University Press, 2010. doi:10.1093/acprof:oso/9780199591466.003.0006.

- Dekker, Ige F. and Harry H. G. Post, ed. *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective*. Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1992.
- Dembour, Marie-Bénédicte and Emily Haslam. 'Silencing Hearings? Victim-Witnesses at War Crimes Trials'. *European Journal of International Law* 15, no. 1 (February 2004): 151-177. doi:10.1093/ejil/15.1.151.
- Dinstein, Yoram. 'The Principle of Proportionality'. In *Searching for a 'Principle of Humanity' in International Humanitarian Law*, edited by Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen, 72-85. Cambridge: Cambridge University Press, 2012.
- . *The Conduct of Hostilities Under the Law of International Armed Conflict*. 3rd ed. Cambridge: Cambridge University Press, 2016. doi:10.1017/CBO9781316389591.
- Duffy, Christopher. *Siege Warfare: The Fortress in the Early Modern World 1494-1660*. London: Routledge, 1997. Proquest Ebook Central.
- Dworkin, Ronald. *Justice for Hedgehogs*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2011.
- . 'A New Philosophy for International Law'. *Philosophy & Public Affairs* 41, no. 1 (2013): 2-30.
- Ezzy, Douglas. *Qualitative Analysis*. London: Routledge, 2002.
- Fast, Larissa. 'Unpacking the Principle of Humanity: Tensions and Implications'. *International Review of the Red Cross* 97 no. 897/898 (2015): 111-131. doi:10.1017/S1816383115000545.
- Farrell, Michelle. 'Complicity, Critique and I'. In *Critical Approaches to International Criminal Law: An Introduction*, edited by Christine Schwöbel, 96-114. London: Routledge, 2014.
- Feichtner, Isabel. 'Realizing Utopia through the Practice of International Law'. *European Journal of International Law* 23, no. 4 (2012): 1143-1157. doi:10.1093/ejil/chs062.
- Fenrick, William J. 'Attacking the Enemy Civilian as a Punishable Offense'. *Duke Journal of Comparative & International Law* 7 (1997): 539-569.
- . 'A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor V. Tihomir Blaškić'. *Leiden Journal of International Law* 13, no. 4 (2000): 931-947.
- . 'The Prosecution of Unlawful Attack Cases before the ICTY'. *Yearbook of International Humanitarian Law* 7 (2004): 153-189. doi:10.1017/S1389135904001539.
- . 'Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities'. *Boston College International and Comparative Law Review* 30 (2007): 111-137.
- . 'Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives'. *Windsor Yearbook of Access to Justice* 27, no. 2 (2009): 271-284.

- Flick, Uwe. *Managing Quality in Qualitative Research*. London: SAGE Publications, 2007. Proquest Ebook Central.
- . 'Mapping the Field'. In *The SAGE Handbook of Qualitative Data Analysis*, edited by Uwe Flick, 3-18. London: SAGE Publications, 2013. Proquest Ebook Central.
- Garbett, Claire. *The Concept of the Civilian: Legal Recognition, Adjudication and the Trials of International Criminal Justice*. Abingdon: Routledge, 2015.
- Gardam, Judith G. *Non-Combatant Immunity as a Norm of International Humanitarian Law*. Leiden, The Netherlands: Brill | Nijhoff, 1993.
- Gaudreau, Julie. 'The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims'. *International Review of the Red Cross* 849 (2003): 143-184. <https://www.icrc.org/en/doc/resources/documents/article/review/review-849-p143.htm>.
- Gee, James Paul. *Introduction to Discourse Analysis: Theory and Method*. New York and London: Routledge, 2011. Proquest Ebook Central.
- Gibbs, Graham R. 'Using Software in Qualitative Analysis'. In *The SAGE Handbook of Qualitative Data Analysis*, edited by Uwe Flick, 277-294. London: SAGE Publications, 2013. Proquest Ebook Central.
- Gibson, William and Andrew Brown. *Working with Qualitative Data*. London: SAGE Publications, 2009. Proquest Ebook Central.
- Gill, Terry and Dieter Fleck, eds. *The Handbook of the International Law of Military Operations*. Oxford: Oxford University Press, 2011.
- Ginsburg, Tom and Gregory Shaffer. 'How does International Law Work?' In *The Oxford Handbook of Empirical Legal Research*, edited by Peter Cane and Herbert M. Kritzer, 753-784. Oxford: Oxford University Press, 2010.
- Gordy, Eric. 'The Blaškić Trial: Politics, the Control of Information and Command Responsibility'. *Southeastern Europe* 36, no. 1 (2012): 60-86.
- Gow, James. *The Serbian Project and its Adversaries: A Strategy of War Crimes*. London: Hurst & Company, 2003.
- Greenwood, Christopher. 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict'. In *The Gulf War 1990/91 in International and English law*, edited by Peter Rowe, 63-88. Abingdon: Routledge, 1993.
- Hart, H. L. A. *The Concept of Law*. 2nd ed. Oxford: Clarendon, 1994.
- Hayashi, Nobuo. 'Military Necessity'. PhD Thesis, Leiden University, 2017.

- Heilmann, Daniel. Review of *The Law of Command Responsibility* by Guénaél Mettraux. *European Journal of International Law* 21, no. 2 (May 2010): 486-490. doi.org/10.1093/ejil/chq030.
- Heller, Kevin. *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. Oxford: Oxford University Press, 2012.
- Henckaerts, Jean-Marie and Louise Doswald-Beck, eds. *Customary International Humanitarian Law*. 2 Volumes. Geneva; Cambridge: International Committee of the Red Cross and Cambridge University Press, 2005.
- Henquet, Thomas, 'Convictions for Command Responsibility Under Articles 7(1) and 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia'. *Leiden Journal of International Law* 15, no. 4 (2002), 805-834. doi:10.1017/S0922156502000365.
- Hughes, Christina, 'From field notes to dissertation: analyzing the stepfamily'. In *Analyzing Qualitative Data*, edited by Alan Bryman and Robert G. Burgess, 35-46. London: Routledge, 2002.
- Jorgensen, Marianne W. and Louise J. Phillips. *Discourse Analysis as Theory and Method*. London, Thousand Oaks, New Delhi: SAGE Publications, 2002.
- Kennedy, Duncan. *A Critique of Adjudication: Fin De Siècle*. Cambridge, Massachusetts; London, England: Harvard University Press, 1997.
- Kerr, Rachel. *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law Politics and Diplomacy*. Oxford: Oxford University Press, 2004.
- King, Kimi, Meernik, James and McKay, Melissa. 'Bearing Witness: The Impact of Testifying at War Crimes Tribunals'. Paper for delivery at the 2016 International Studies Association and Central and East European International Studies Association Joint International Conference in Ljubljana, Slovenia June 22-26 2016. <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjlsYLg9prjAhVNTsAKHUdJDFcQFjAAegQIBRAC&url=http%3A%2F%2Fweb.isanet.org%2FWeb%2FConferences%2FCEEISA-ISA-LBJ2016%2FArchive%2Fd584a2ff-1cb5-4380-aea9-a52a8ded1b75.pdf&usg=AOvVaw3-wcVXtccGmw2HV3LS1Cps>.
- King, Kimi and Meernik, James. *The Witness Experience: Testimony at the ICTY and its Impact*. New York: Cambridge University Press, 2017.
- Kolb, Robert. 'The Main Epochs of Modern International Humanitarian Law since 1864 and their Related Dominant Legal Constructions'. In *Searching for a 'Principle of Humanity' in International Humanitarian Law*, edited by Larsen, Kjetil Mujezinović, Camilla Guldahl Cooper and Gro Nystuen, 23-71. Cambridge: Cambridge University Press, 2012. doi:10.1017/CBO9781139134972.003.
- . 'Gotovina and the ICTY'. *Swiss Review of International and European Law* 27, no. 4 (2017): 483-488.

- Larsen, Kjetil Mujezinović, Camilla Guldahl Cooper and Gro Nystuen, ed. *Searching for a 'Principle of Humanity' in International Humanitarian Law*. Cambridge: Cambridge University Press, 2012. doi:10.1017/CBO9781139134972.
- Luban, David. 'Military Necessity and the Cultures of Military Law'. *Leiden Journal of International Law* 26, no. 2 (2013): 315-349. doi:10.1017/S092215651300006X.
- Lucraft, Mark, ed. *Archbold Criminal Pleading Evidence and Practice 2019*. Online: Sweet & Maxwell Ltd, 2019. Westlaw.
- Mackenzie, Ruth and Philippe Sands. 'International Courts and Tribunals and the Independence of the International Judge'. *Harvard International Law Journal* 44, no. 1 (Winter 2003): 271-286.
- Meron, Theodor. 'The Humanization of Humanitarian Law'. *The American Journal of International Law* 94, no. 2 (2000): 239-278. doi:10.2307/2555292.
- Mettraux, Guénaél. *The Law of Command Responsibility*. Oxford: Oxford University Press, 2009.
- Moghalu, Kingsley Chiedu. *Global Justice: The Politics of War Crimes Trials*. Westport, Connecticut; London: Praeger Security International, 2006.
- Murphy, Peter. 'No Free Lunch, no Free Proof'. *Journal of International Criminal Justice* 8, no. 2 (May 2010): 539-573.
- Newton, Michael and Larry May. *Proportionality in International Law*. Oxford; New York: Oxford University Press, 2014.
- Nice, Geoffrey. *Justice for all and how to Achieve It*. London: Scala Arts & Heritage Publishers Ltd, 2017.
- Noone, Gregory P. 'History and Evolution of the Law of War Prior to World War II'. *Naval Law Review* 47 (2000): 176-207.
- Ohlin, Jens David. 'Targeting and the Concept of Intent'. *Michigan Journal of International Law* 35 (2013): 79-130.
- Olasolo, Hector. *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute*. Boston: BRILL, 2007. ProQuest Ebook Central.
- Pavlaković, Vjeran. 'Croatia, the International Criminal Tribunal for the Former Yugoslavia, and General Gotovina as a Political Symbol'. *Europe-Asia Studies* 62, no. 10 (2010): 1707-1740. doi:10.1080/09668136.2010.522426.
- Payandeh, Mehrdad. 'The Concept of International Law in the Jurisprudence of H.L.A. Hart'. *European Journal of International Law* 21, no. 4 (2010): 967-995. doi:10.1093/ejil/chq065.
- Powderly, Joseph, 'Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?' In *Judicial Creativity at the International Criminal Tribunals*, edited by Shane Darcy and

- Joseph Powderly, 17-44. Oxford: Oxford University Press, 2010.
DOI:10.1093/acprof:oso/9780199591466.003.0002.
- Rapley, Tim. *Doing Conversation, Discourse and Document Analysis*. Los Angeles, London, New Delhi, Singapore: SAGE Publications, 2007.
- Redwood, Henry Alexander. 'Accounting for Violence: The Production, Power and Ownership of the International Criminal Tribunal for Rwanda's Archive'. PhD Thesis, King's College London, 2018.
- Robinson, Darryl. 'The Identity Crisis of International Criminal Law'. *Leiden Journal of International Law* 21, no. 4 (2008): 925-963. doi:10.1017/S0922156508005463.
- Roberts, Adam and Richard Guelff, *Documents on the Laws of War*, 3rd ed. Oxford: Oxford University Press, 2000.
- Rushworth, Dennis. 'Mapping in Support of Frontier Arbitration: Delimitation and Demarcation'. IBRU Boundary & Security Bulletin 5, no. 1 (1997): 61-64.
<https://www.dur.ac.uk/ibru/publications/view/?id=105>
- Scheffer, David. *All the Missing Souls: A Personal History of the War Crimes Tribunals*. Princeton: Princeton University Press, 2011.
- Schmitt, Michael N. 'Precision Attack and International Humanitarian Law'. *International Review of the Red Cross* 87, no. 859 (2005): 445-466. doi:10.1017/S1816383100184334.
- . 'Fault Lines in the Law of Attack'. In *Testing the Boundaries of International Humanitarian Law*, edited by Susan Breau and Agnieszka Jachec-Neale, 277-307. London: British Institute of International and Comparative Law, 2006.
- Schreier, Margrit. 'Qualitative Content Analysis'. In *The SAGE Handbook of Qualitative Data Analysis*, edited by Uwe Flick, 170-183. London: SAGE Publications, 2013.
- Schwöbel, Christine, ed. *Critical Approaches to International Criminal Law: An Introduction*. Abingdon: Routledge, 2014.
- Simpson, Gerry. 'History of Histories'. In *Hidden Histories of War Crimes Trials*, edited by Kevin Heller and Gerry Simpson, 37-44. Oxford: Oxford University Press, 2013. Proquest Ebook Central.
- Slidregt, Elies van. 'Command Responsibility at the ICTY: Three Generations of Case-Law and Still Ambiguity'. In *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, edited by Bert Swart, Alexander Zahar and Göran Sluiter, 377-400. Oxford: Oxford University Press, 2011. doi:10.1093/acprof:oso/9780199573417.003.0014.
- Smidt, Michael L. 'Yamashita, Medina, and beyond: Command Responsibility in Contemporary Military Operations'. *Military Law Review* 164 (2000): 155-234.
- Smith, Bradley F. *Reaching Judgment at Nuremberg*. London: Andre Deutsch, 1977.

- Solan, Lawrence M. *The Language of Judges*. Chicago and London: The University of Chicago Press, 1993.
- Spiers, Jude, Janice M. Morse, Karin Olson, Maria Mayan, and Michael Barrett. 'Reflection/Commentary on a Past Article: "Verification Strategies for Establishing Reliability and Validity in Qualitative Research"'. *International Journal of Qualitative Methods* 17, no. 1 (2018): 1-2. doi:10.1177/1609406918788237.
- Stephens, Dale. 'Blurring the Lines: The Interpretation, Discourse and Application of the Law of Armed Conflict'. *Yearbook of International Humanitarian Law* 12 (2009): 85-118. doi:10.1017/S138913590900004X.
- Stover, Eric. *The Witnesses: War Crimes and the Promise of Justice in The Hague*. Philadelphia: University of Pennsylvania Press, 2005. <http://www.jstor.org/stable/j.ctt3fhm43>.
- Swart, Bert, Alexander Zahar, and Göran Sluiter, ed. *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*. Oxford: Oxford University Press, 2011. doi:10.1093/acprof:oso/9780199573417.001.0001.
- Swart, Mia. 'Gap-Filling as Law-Making: The Examples of the Ad Hoc International Criminal Tribunals'. In *Select Proceedings of the European Society of International Law: Volume 2 (2008)*, edited by Hélène Ruiz Fabri, Rüdiger Wolfrum and Jana Gogolin, 313-330. London: Hart Publishing, 2010.
- Teitel, Ruti G. *Humanity's Law* Oxford University Press, 2011. doi:oso/9780195370911.001.0001.
- Thürer, Daniel. *International Humanitarian Law: Theory, Practice, Context*. The Hague: Hague Academy of International Law, 2011.
- Tiersma, Peter M. and Lawrence M. Solan, ed. *The Oxford Handbook of Language and Law*. Oxford, New York: Oxford University Press, 2012.
- Tomuschat, Christian. 'The Legacy of Nuremberg'. *Journal of International Criminal Justice* 4, no. 4 (September 2006): 830-844. <https://doi.org/10.1093/jicj/mql051>.
- Valentino, Benjamin, Paul Huth and Sarah Croco. 'Covenants without the Sword: International Law and the Protection of Civilians in Times of War'. *World Politics* 58, no. 3 (2006): 339-377.
- Wald, Patricia M. 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal Note from the Field'. *Yale Human Rights & Development Law Journal* 5, no. 1 (2002): 217-239.
- . 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court'. *Washington University Journal of Law and Policy* 5 (2001): 87-118.
- Warbrick Colin and Peter Rowe. 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case'. *The International and Comparative Law Quarterly* 45, no. 3 (1996): 691-701.

- Watkin, Kenneth. 'Assessing Proportionality: Moral Complexity and Legal Rules'. *Yearbook of International Humanitarian Law* 8 (2005): 3-53. doi:10.1017/S1389135905000036.
- Webley, Lisa. 'Qualitative Approaches to Empirical Legal Research'. In *The Oxford Handbook of Empirical Legal Research*, edited by Peter Cane and Herbert M. Kritzer, 926-950. Oxford: Oxford University Press, 2010.
- Wierda, Marieke. 'International Criminal Evidence: New Directions'. *Law and Practice of International Courts and Tribunals* 2, no. 3 (2003): 401-409.
- Wilson, Page. 'The myth of international humanitarian law'. *International Affairs* 93, no. 3 (May 2017): 563-579. <https://doi.org/10.1093/ia/iix008>.
- Wilt, Harmen van der. 'Srebrenica: On Joint Criminal Enterprise, Aiding and Abetting and Command Responsibility'. *Netherlands International Law Review* 62, no. 2 (2015): 229-241.
- Wuerzner, Carolin. 'Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects before International Criminal Tribunals'. *International Review of the Red Cross* 90, no. 872 (December 2008): 907-930. doi:10.1017/S1816383109000228.
- Wyngaert, Christine Van den. 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge'. *Case Western Reserve Journal of International Law* 44, no.s 1 and 2 (2011): 475-496.
- Zahar, Alexander. 'Civilizing Civil War: Writing Morality as Law at the ICTY'. In *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, edited by Bert Swart, Alexander Zahar and Göran Sluiter, 469-504. Oxford: Oxford University Press, 2011. DOI:10.1093/acprof:oso/9780199573417.003.0017.